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In the Supreme Court of the United States

OCTOBER TERM, 1975

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KENT FRIZZELL, ACTING SECRETARY
OF THE INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Acting Secretary of the Interior, the Secretary of Agriculture, and the Secretary of the Army, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A-73A) is reported at 514 F. 2d 856. The order of the court of appeals granting an injunction pending appeal (App. B, *infra*, pp. 75A-80A) is reported at 509 F. 2d 533. The order of the court of appeals remanding the case to the district court for supplemental findings (App. C, *infra*, pp. 81A-83A) is not

reported. The opinion of the district court (App. D, *infra*, pp. 85A-101A) and its supplemental findings of fact (App. E, *infra*, pp. 103A-116A) are not reported.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, pp. 117A-118A) was entered on June 16, 1975. By order of September 3, 1975, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Federal law authorizes the Department of the Interior to permit coal mining on federal lands by private parties under approved mining plans. In order to evaluate the environmental effects of its leasing program and decide upon future actions, the Department prepared a nationwide, programmatic environmental impact statement. Before issuing individual leases or approving mining plans, the Department prepares an environmental impact statement considering the effects of that lease or mining plan, both individually and in combination with other leases. When necessary or appropriate, the Department also prepares impact statements for areas of intermediate size, such as the 7,800 square mile "Eastern Powder River Basin" within Wyoming.

The question presented is whether, under the National Environmental Policy Act, a court may inter-

vene in this decision making process to require federal agencies to engage, as well, in "regional" planning and to issue an additional impact statement for a four-state area so long as they continue "contemplating" private applications, even though there neither is nor will be a recommendation or report on ~~the~~ proposal for major federal action with respect to that four-state area.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

(2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

STATEMENT

A. FEDERAL PROGRAMS FOR COAL DEVELOPMENT

As much as 80 percent of the Nation's coal reserves are under land owned by the federal government, or under land that can be mined effectively only after obtaining rights of way across federal land.¹ The Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. (1970 ed. and Supp. III) 181 *et seq.*, authorizes the Department of the Interior to dispose of certain minerals by leasing to private firms and individuals, for terms of years, the rights to develop and extract coal, oil, and other minerals that lie within the federal domain and Indian lands. As privately owned coal deposits become exhausted or more expensive to mine, and as the Nation's energy needs grow, coal underlying federal lands will become more and more important as a source of energy.²

The development of these vast reserves of coal will inevitably affect the quality of the human environment in the vicinity of the mines. The federal government not only has the duty to superintend the development

¹ Department of the Interior, *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program 1-7* (1975) (hereafter *National Impact Statement*). A copy of the *National Impact Statement* has been lodged with the Clerk.

² See *National Impact Statement*, *supra*, n. 1, at 1-24 to 1-28.

of its mineral resources, but also has the duty, articulated by the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4331, *et seq.* (NEPA), to probe the environmental consequences of its proposed actions and to develop its resources in a manner that holds to a minimum the disruption of the environment.

In order to fulfill both of these duties, federal agencies, cooperating with each other, with state governments, and with private interests, began to take a careful look at the effects of coal development in the northern Great Plains, where most of the federal coal resources are located. On May 26, 1970, the Department of the Interior initiated the North Central Power Study, which was designed to "investigate the potential for coordinated development of the electric power supply in the north central United States" (App. D, *infra*, p. 89A). "The responses received did not indicate that a plan for the coordinated development could be formulated" (*id.* at 90A), and the Study was terminated in 1972.

The Department of the Interior also began a study of potential water resources in Montana and Wyoming, and the extent to which these resources would be adequate for, and affected by, development of coal (*ibid.*). This study was ~~terminated~~ ^{superceded} on June 30, 1972, when the Department initiated the Northern Great Plains Resources Program, a much more comprehensive investigation of the social, economic and environmental aspects of coal development. That study was

designed to provide much-needed information that could guide the federal government in decision making. "The study is to provide a tool for planning at all levels of government rather than to develop an actual plan" (*id.* at 93A). The final interim report of this Program was issued on August 1, 1975.

In order to avoid making piecemeal decisions while it was gathering environmental information and formulating a national coal leasing program, the Department of the Interior announced on February 17, 1973, that it would issue no more coal prospecting permits and, with a few carefully circumscribed exceptions, it would issue no more coal leases until it had reevaluated its coal leasing policies and conducted a full environmental study (*id.* at 90A-92A). The Department simultaneously announced that it would prepare an environmental impact statement assessing the effects of its coal leasing program on a nationwide basis and undertaking to formulate a new leasing program more sensitive to environmental values. A draft of this national programmatic impact statement was issued in 1974. It was rewritten in response to comments and reissued in final form on September 19, 1975.³ The final impact statement describes "the total proposed Departmental coal leasing program"⁴ and announces the creation of a multistep Energy Minerals Activity Recommendation System⁵ that takes into account both the Nation's need for coal and the need to preserve the quality of its environment.

³ *National Impact Statement, supra*, n. 1.

⁴ *Id.* at 1-3.

⁵ *Id.* at 1-7 to 1-23.

Under the Energy Minerals Activity Recommendation System new coal leases will be made available only when necessary and, even then, "[a]ll coal lease sales would be carefully analyzed to avoid unacceptable environmental impacts or unacceptable impacts on other uses resulting from development of the proposed leases."⁶ The central principle balancing the need for coal against the environmental consequences of mining is that "[l]easing will not take place where environmental damages would be unacceptable."⁷

The national programmatic environmental impact statement has surveyed the general environmental consequences of coal mining. The environmental consequences of each particular mine, however, will have to be understood in order to implement the decision that some deposits of coal will not be leased when the environmental consequences would be too great. Individual environmental impact statements therefore are prepared for each lease,⁸ and the statements for successive leases or mining plans assess the cumulative effects of all coal development within the area affected. In many cases the Department of the Interior will prepare a broader impact statement assessing the effects of coal development in larger parts of the country: "the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries,

⁶ *Id.* at 1-5.

⁷ *Id.* at 1-13.

⁸ A more complete description appears in *id.* at 1-4.

areas of economic interdependence, and other relevant factors.”⁹ One such impact statement already has been prepared, and was issued in final form in 1974; this statement, consisting of 6 volumes and 3075 pages, covers the Eastern Powder River Coal Basin of Wyoming, an area of approximately 7,800 square miles that contains more than one quarter of the Nation’s strippable coal reserves and three quarters of the coal reserves of the northern Great Plains.¹⁰

B. THE COMPLAINT AND THE DISTRICT COURT’S DECISION

Respondents Sierra Club and others brought suit, seeking declaratory and injunctive relief against any approval of leases, rights of way or mining plans in what their complaint called the “Northern Great Plains Region” until the federal government had prepared a comprehensive impact statement with respect to that “Region” (App. D, *infra*, p. 85A).¹¹ The district court, after recounting the status of the environmental investigations under way and the moratorium

⁹ *Id.* at 1-4.

¹⁰ Department of the Interior, *Final Environmental Impact Statement: Proposed Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming* (1974). See I *id.* at I-21 to I-22 (estimating that the basin contains 12.4 billion tons of economically recoverable coal out of a national total of 45 billion tons of coal economically recoverable by strip mining).

¹¹ The “Northern Great Plains Region” defined by the complaint includes northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota (App. D, *infra*, p. 88A). This “Region” encompasses some 90,000 square miles (App. A, *infra*, p. 5A, n. 4).

on coal leases, concluded that as of the date of its opinion (February 1974) the federal government was engaged in decision making on a national basis, and that there was no separate program taking place, or planned to take place, in the area defined by respondents as the “Northern Great Plains Region” (App. D, *infra*, pp. 95A, 96A, 100A). Therefore, the court concluded, no impact statement for the “Region” need be prepared.

The district court later entered supplemental findings in response to a remand by the court of appeals (App. C, *infra*, pp. 81A-83A). These findings (App. E, *infra*, pp. 103A-116A) brought the record up to date as of November 25, 1974.

C. THE COURT OF APPEALS’ DECISION

Shortly after the district court entered its supplemental findings, the court of appeals issued an injunction pending appeal (App. B, *infra*, pp. 75A-76A). This injunction prohibited the Secretary of the Interior from taking any action “concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement” (*id.* at 76A). The court of appeals did not conclude that the Eastern Powder River Basin impact statement is inadequate; indeed, its adequacy has not been challenged. It recited only that “such an injunction is required to maintain the status quo pending disposition of this appeal” (*id.* at 75A). Judge McKinnon dissented (*id.* at 76A-80A).

Six months later a divided panel of the court of appeals reversed the district court (App. A, *infra*, pp. 1A-73A). The court held that, although petitioners have not yet violated NEPA, they will do so if they continue "contemplating" federal action in the "Northern Great Plains Region" without preparing an environmental impact statement with respect to that part of the country.¹² See App. A, *infra*, pp 2A, 47A-48A.

The court of appeals did not disturb the district court's finding that there was no existing federal program or proposal calling for regional development. It therefore had to consider respondents' argument that the various private requests for leases and rights of way were so related that the government should be required to develop a regional plan accompanied by a comprehensive impact statement (*id.* at 28A-32A). The court of appeals indicated that respondents' arguments probably were correct (*id.* at 31A-32A), but concluded that it need not explicitly so hold. It decided instead that, by engaging in regional studies and analyses such as the Northern Great Plains Resources

¹² The court of appeals' decision is interlocutory in the sense that it does not finally dispose of this litigation. However, it laid down principles of law that preordain the final outcome, and that will prolong this case (and the federal decision making process) by many years. On the other hand, if the court of appeals' judgment is reversed, the case will come to an end immediately. We submit that the court of appeals' judgment possesses sufficient finality that review at this time is both necessary and appropriate. See *Aberdeen & Rockfish R. R. v. SCRAP*, No. 73-1966, decided June 24, 1975, slip op. 22-25; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3.

Program, and by receiving (albeit not granting) applications for leases, the government had demonstrated "attempts" "to control development" of coal resources in the area, which establish that a "regional program" "is contemplated" by the government (*id.* at 33A, 39A; emphasis added). This "contemplation" in turn triggers the impact statement requirement of NEPA, the court held, because an impact statement "must precede" (*id.* at 42A) any recommendation or report on a proposal for major federal action.

The court recognized that, despite its conclusion that the government is "contemplating" regional development, the "Government has not yet finally settled on its role" (*id.* at 45A). The court therefore remanded the case to the district court and directed the federal agencies to determine whether they would prepare an impact statement or whether "contrary to expectations" they would cease following the course the court thought they had been following (*id.* at 47A-50A). If the government decides not to prepare an impact statement for the region described by respondents, the court held, respondents "may present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement" (*id.* at 50A). Since the court already has indicated (*id.* at 29A-32A) that respondents' contention is correct, it follows that the district court would be compelled to direct the government to prepare an impact statement if it declines the court of appeals' invitation to do so voluntarily.

The court of appeals continued in effect its temporary injunction pending appeal, even though it once more conceded that the "Secretary of the Interior has shown concern over developing the coal reserves of the Province in a responsible manner consistent with NEPA" (*id.* at 4A-5A).

Judge MacKinnon dissented, observing that the "record * * * does not establish the existence of any comprehensive *regional* program of the type * * * which could justify requiring the preparation of a regional environmental impact statement at this time" (*id.* at 54A). Because there was neither federal action with respect to the region, nor a proposal for such action, Judge MacKinnon "conclude[d] that a regional environmental impact statement * * * is not presently required * * * [and found] no need to remand the case for further proceedings" (*id.* at 52A-53A).

REASONS FOR GRANTING THE WRIT

This is the sixth year that NEPA has been in effect. During that entire period the Department of the Interior, and other federal agencies, have been giving careful scrutiny to the environmental effects of coal mining. Several extensive environmental, economic and social studies have been carried out; a national programmatic impact statement has been prepared; individual, local, and regional impact statements have been prepared. For almost three years there has been a virtual moratorium on the issuance of new leases. Now that the federal government is preparing to put the carefully designed Energy Minerals Activity Recommendation System into operation and remove

the moratorium, it has been confronted with a decision and injunction that could delay its program for several years, while it prepares yet another environmental impact statement covering a "Region" of respondents' choosing.

The court of appeals' decision implies that groups other than respondents will be able to compel the federal government either to engage in "regional planning" or to issue impact statements with respect to regions defined by them, whether or not the government has engaged in activity that has peculiar effects upon that "region." And, of course, the court's decision will require lengthy litigation in the district court on remand and will almost certainly lead to repeated appeals, injunctions, and threats of both over an extended period of time. The decision is of substantial importance to the Nation's energy resources development program, and conflicts with the language of NEPA, a decision of this Court, and decisions of other courts of appeals.

1. Section 102(2)(C) of NEPA provides that federal agencies shall include "in every recommendation or report on proposals for legislation and other major federal actions" significantly affecting the quality of the human environment a detailed statement concerning the effects of, and alternatives to, that proposal. As the Court held in *Aberdeen & Rockfish R.R. v. SCRAP*, No. 73-1966, decided June 24, 1975, slip op. 26 (*SCRAP II*), this language means that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action."

NEPA requires an impact statement only when the federal agency makes, recommends, or reports upon a proposal for major federal action. In *SCRAP II* private railroads had proposed to the Interstate Commerce Commission that the Commission approve an increase in the rates the railroads would be allowed to charge; the Court held that no impact statement was required until the Commission made its report upon that private proposal. Here, to the extent there are any proposals for major federal action with respect to the region defined by respondents, they are private proposals for the federal government to issue leases or approve mining plans or rights of way; as was the case in *SCRAP II*, no impact statement is necessary until the government makes a recommendation or report on those private proposals, and the Department of the Interior already has prepared (or will prepare) impact statements with respect to every major lease or mining plan approved by it.¹³

As we understand the court of appeals' opinion, it rests upon a simple misunderstanding concerning the timing established by NEPA. The court variously states that an impact statement must accompany the proposal for federal action (App. A, *infra*, p. 48A) and that an impact statement must *precede* any recommendation or report on a proposal for federal action (*id.* at 42A; 47A, n. 35). If either version were correct, it might have been necessary for the court of appeals

¹³ This case does not involve the question whether an impact statement must be prepared when the government engages in major physical action for which there has never been any public proposal, recommendation, or report.

to undertake an inquiry into whether the federal government's "contemplation" of taking action in the future had ripened into a "proposal," and to "balance" the factors showing "ripeness" and those of contrary import (see *id.* at 42A-50A). It might have been necessary, as the court of appeals thought, to remand for further consideration of this "ripeness" question. But NEPA provides that the impact statement shall accompany the recommendation or report, not "precede" it; there is no "ripeness" question to address where, as here, no one contends that there has been a recommendation or report on a relevant proposal with respect to the "Region" as a whole.¹⁴

2. The opinion of the court of appeals appears to conclude that federal "contemplation" of certain actions must be accompanied by an impact statement. The court went on to hold that such a statement must discuss environmental consequences throughout the "Northern Great Plains Region" defined by respondents (App. A, *infra*, pp. 47A-48A). If it is assumed *arguendo* that some sort of impact statement is required, the question of the appropriate scope of that

¹⁴ The court of appeals relied upon *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F. 2d 1109 (C.A.D.C.), and *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F. 2d 927 (C.A. 2), vacated and remanded *sub nom. Coleman v. The Conservation Society of Southern Vermont, Inc.*, No. 74-1413, decided October 6, 1975, to support its understanding of the appropriate time to issue an impact statement. But *Calvert Cliffs* was expressly disapproved in *SCRAP II* (see slip op. at 26, n. 20), as was *Greene County Planning Board v. Federal Power Commission*, 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849, upon which *Conservation Society* was based.

statement is one that has generated a conflict among the circuits requiring resolution by this Court.

Other circuits, when approaching the question of the scope of a particular impact statement, have held that a statement is sufficient if it discusses a single project of "independent utility"¹⁵ or if it discusses all of the activities to which resources are irretrievably committed by the project for which the statement has been prepared.¹⁶ The court of appeals, relying upon *Conservation Society, supra*, disagreed with these cases and held that an impact statement must assess, in a comprehensive manner, all actions and environmental impacts that might be related to the action proposed.

Although the court of appeals stated that its requirement of comprehensive consideration did not conflict with the "independent utility" and "foreclosure of alternatives" rules used in other circuits (*id.* at 39A-41A, n. 29), we submit that the conflict is obvious. Single leases have "independent utility" and so, under the decisions of other courts of appeals, could properly be studied alone. Each lease "irretrievably commits" no more resources than are involved in bringing the mine to production, for the first lease can be commercially feasible whether or not other leases are granted;

¹⁵ See, e.g., *Trout Unlimited v. Morton*, 509 F. 2d 1276 (C.A. 9); *Sierra Club v. Stamm*, 507 F.2d 788 (C.A. 10); *Sierra Club v. Callaway*, 499 F. 2d 982 (C.A. 5); *Indian Lookout Alliance v. Volpe*, 484 F. 2d 11 (C.A. 8).

¹⁶ See, e.g., *Daly v. Volpe*, 514 F. 2d 1106 (C.A. 9); *Friends of the Earth, Inc. v. Coleman*, 518 F. 2d 323 (C.A. 9); *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F. 2d 378 (C.A. 2).

smaller impact statements on individual mines or on intermediate areas such as the Eastern Powder River Basin therefore would be appropriate in other circuits.

The court of appeals distinguished the cases in other circuits on the ground that those cases "involved the propriety of an injunction against an individual project pending completion of a regional [impact statement] or other study," and that "[n]one of the cases involved a direct challenge to the need for a regional" impact statement (*ibid.*). Judge MacKinnon correctly answered that this "is a classic example of a distinction without a difference" (*id.* at 65A). Respondents have requested the court to enjoin the granting of leases and other coal resource development actions pending completion of an impact statement covering the "Region" defined in their complaint, and the court of appeals has issued such an injunction. Moreover, each of the cases we have collected at notes 15 and 16, *supra*, considered and rejected a contention that an impact statement was too narrow in scope because it did not assess the effects of allegedly "related" projects covered by a single plan for development. We submit that there is no practical difference between the question posed and answered by the court of appeals in the instant case, and the question as framed by the other courts of appeals.

3. The court of appeals held that the federal government had not yet violated NEPA—although, the court surmised, it would do so momentarily unless it either ceased "contemplating" action or provided a regional impact statement. Having concluded that the defend-

ants before it were in compliance with NEPA, the court of appeals should have affirmed the district court's summary judgment in favor of petitioners. It was not at liberty to reverse, remand, issue an exhaustive (but apparently advisory) opinion governing proceedings still to come, continue in effect an injunction pending appeal, and retain jurisdiction over petitioners simply out of the expectation that, in the future, they might violate NEPA. Cf. *Herb v. Pitcairn*, 324 U.S. 117, 126: "[O]ur power is to correct wrong judgments, not to revise opinions." The court of appeals should have held that the district court's judgment—that petitioners have not violated NEPA—was correct, and accordingly affirmed.

4. Even if an impact statement sometimes must be issued when federal agencies are "contemplating" action, and even if such a statement must assess the environmental impacts of all "related" activities throughout the relevant "region," the decision of the court of appeals is incorrect. The choice of the relevant region is, in the first instance, for federal officials, to be upset only if their choice is arbitrary, capricious or an abuse of discretion. The court of appeals agreed with these principles (App. A, *infra*, pp. 31A, n. 25; 32A; 45A-46A, n. 33; 48A, n. 36). How, then, could the court conclude that it was an abuse of discretion to select for scrutiny the Eastern Powder River Basin, an area containing more than a third of the coal reserves economically recoverable by surface mining in the northern Great Plains? The court of appeals did not explain why it was an abuse to select for "regional" study an area other than the "Northern

Great Plains Region" defined by respondents. We do not think this omission can be explained unless the court was, in fact, compelling the government to engage in "regional" planning more broadly defined, the very course it purported to eschew (*id.* at 30A-32A). That course, in turn, would raise fundamental problems under *United States v. SCRAP*, 412 U.S. 669 (*SCRAP I*), which held that NEPA does not repeal by implication any other statutes. The Mineral Leasing Act of 1920 grants to the Department of the Interior substantial discretion to decide how and when coal leases will be awarded; the court of appeals apparently has held that the government now must exercise that discretion on a regional basis rather than lease-by-lease as the Act provides.¹⁷

5. The most important flaw in the court's reasoning may be its statement that, by granting leases and receiving mining plans pertaining to the northern Great Plains, the government's "role is one of controlling development of the region" (App. A, *infra*, pp. 47A-48A). That statement, of course, begs the

¹⁷ Although the court of appeals indicated that unless the government ceased "contemplating" issuing leases the government would be required to issue a regional impact statement for the "Northern Great Plains Region" defined by respondents, it did not explain why it selected that "region" as opposed to some alternative "region." Since there are almost an endless number of "regions" available for study, the court's opinion creates two possibilities: either the "region" studied will be whatever region is selected by the first groups to file suit, or, even after the government prepares the impact statement sought by respondents, still other groups can file suits seeking impact statements for still other "regions" in the Great Plains. Neither result is desirable; neither is required by NEPA.

question of *what* region is being "controlled." But what is more, it necessarily involves the untenable assumption that the federal government must have *some* region in mind, and that the task for the court is to direct the government to file an impact statement with respect to whatever region that may be. The court of appeals ignored the possibility that the federal coal leasing program is national rather than regional.

The government is not attempting to control the development of particular "regions"; it is attempting to control the development of coal on federal lands, which are themselves scattered throughout the country. Coal development creates "regional development" only because some federal land holdings are close to other holdings, and the effects of developing some tracts may be felt on proximate tracts. That degree of interdependence, however, and the desire of the federal government to learn more about it through tools such as the Northern Great Plains Resources Program, hardly indicates that a plan for "regional development of the Northern Great Plains" (*id.* at 33A), or of any other region, is either "contemplated" or under way. It simply demonstrates that the federal government is deeply interested in the local effects of its national policies.¹⁸ NEPA does not require, how-

¹⁸ One of the ironic effects of the decision below is that federal agencies would be less likely to engage in sophisticated studies such as the Northern Great Plains Resources Program, lest a court erroneously conclude from the study that the government is "contemplating" major federal action with respect to the "region" studied and, therefore, is obliged to issue a "regional" impact statement.

ever, that an impact statement accompany such shows of interest, however abiding the interest may be. We submit that the program of impact statements for individual mines, local groups of mines, and the nation as a whole, adequately fulfills the commands of Section 102(2)(C). It is not necessary to suspend the development of coal resources for several years more while the government prepares a "regional" impact statement as the price of continued "contemplation."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

United States Court of Appeals for the District of
Columbia Circuit

SIERRA CLUB ET AL., APPELLANTS

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED
STATES DEPARTMENT OF THE INTERIOR, ET AL.

(No. 74-1389)

United States Court of Appeals, District of Columbia
Circuit

(Argued Dec. 17, 1974; Decided June 16, 1975)

Before BAZELON, Chief Judge, and WRIGHT and
MACKINNON, Circuit Judges.

Opinion for the court filed by Circuit Judge J.
SKELLY WRIGHT.

Dissenting opinion filed by Circuit Judge
MACKINNON.

J. SKELLY WRIGHT, Circuit Judge:

Appellants brought suit in District Court seeking
declaratory judgment, injunction, and mandamus
against the federal appellees, the Departments of the
Interior, the Army, and Agriculture, alleging that
appellees had violated Section 102(2) of the National
Environmental Policy Act (NEPA), 42 U.S.C. § 4332

(1A)

(2), by allowing development of coal resources in the Northern Great Plains without issuing a comprehensive environmental impact statement (EIS) for the region. We must decide whether appellees' attempts to control development of coal resources in four western states constitute a major federal action within the meaning of Section 102(2), and, if so, whether those attempts are sufficiently developed to require the filing of a comprehensive regional impact statement. Answering the first question in the affirmative, we reverse the District Court's grant of summary judgment for the federal appellees and remand this case to give the federal appellees the opportunity to decide the second.

The Northern Great Plains Province (the Province), which covers northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota, and extends southerly through strips of Nebraska and Colorado, is one of the world's richest basins of relatively untapped coal reserves.¹ Most of the coal in the Province is located in the Fort Union and Powder River formations, which occupy the four northernmost states. The coal resting under those plains is highly desirable because it is of low sulphur content, which makes it environmentally preferable, and because it is relatively close to the surface, which makes it readily accessible by strip mining. Since some 85 per cent of the nation's low-sulphur coal reserves is located on public land under the jurisdiction of the Secretary of the Interior, prudent development of this valuable national asset is largely subject to federal initiative and control. In recent years, as concern

¹ Sixty-three counties in Wyoming, Montana, and North Dakota hold 48% of the nation's total coal reserve. Northern Great Plains Resources Draft Interim Report (hereinafter NGPRP Draft Interim Report) at III-1.

about greater national self-sufficiency in energy matters has mounted, steps toward such development in the Province have been taken. But while the coal reserves of the Province are in great demand, both over the long and the short term,² the massive development of the area necessary to secure, utilize, and deliver those resources necessarily entails broad environmental consequences. In addition to the obvious environmental effects of strip-mining acres of now-fertile land, development would also affect the region's water supply and quality, air quality, wildlife, population distribution and composition, and economic structure. These effects would be caused not only by the mines themselves, but by the power plants, coal gasification plants, railroads, aqueducts, pumping plants, reservoirs, dams, and new housing that would necessarily accompany the strip mines.

Needless to say, such development under federal auspices demands compliance with NEPA's dictate than an impact statement accompany all proposals for "major Federal actions significantly affecting the quality of the human environment * * *." Section 102(2)(C), 42 U.S.C. § 4332(2)(C).³ *See generally*

² For at least the short term, increased use of coal is said to be the best way to ward off an energy crisis. Affidavit of Ralph E. Lapp, Ph. D., App. 286. Over the long term, at present energy growth rates the nation's need for coal will triple by the year 2000. Brief of federal appellees at 6.

³ In pertinent part, § 102(2) of NEPA, 42 U.S.C. § 4332(2) (1970) provides:

"[A]ll agencies of the Federal Government shall—(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

* * * * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly af-

Scientists' Institute for Public Information, Inc. v. AEC (SIPI), 156 U.S. App. D.C. 395, 481 F. 2d 1079 (1973); Natural Resources Defense Council v. Morton, 148 U.S. App. D.C. 5, 458 F. 2d 827 (1972); Greene County Planning Board v. FPC, 2 Cir., 455 F. 2d 412 (1971), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 146 U.S. App. D.C. 33, 449 F. 2d 1109 (1971) The Secretary of the Interior has shown concern over developing the coal reserves of

fecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes:

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[.]

the Province in a responsible manner consistent with NEPA.⁴ NEPA, he recognized, might demand comprehensive development of the Province and a more comprehensive analysis of environmental impact therein than would be produced by impact statements designed for individual mines. Thus on May 26, 1970 the Secretary initiated the North Central Power Study, an attempt to coordinate energy development throughout the North Central States. While unfavorable private response to the Study resulted in its termination, Finding of Fact (Fdg.) 13, Appendix (App.) 237, the Secretary continued to acknowledge that development should be based upon comprehensive, rather than piecemeal, action. Affidavit of Secretary Morton, App. 194. Accordingly, on June 30, 1972 he ordered a massive federal-state inter-agency study, now known as the Northern Great Plains Resources Program (NGPRP), to assess the potential social, economic, and environmental impacts that development of the Province would cause. Secretary Morton wrote to his Assistant Secretaries:

The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environ-

⁴There are currently 14 mining leases in operation in the Province (four in Montana, six in North Dakota, four in Wyoming) covering a total of 90,000 square miles. Fdgs. 8, 11, App. 235, 236. All are operating under federally-approved mining plans and under state-approved reclamation plans. *Id.* While it is not clear from the District Court findings, it appears that all of these leases were issued, and the mining plans approved, prior to the effective date of NEPA.

The Government has also issued coal prospecting permits covering federal lands and four Indian reservations. Fdg. 10, App. 236.

mental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

App. 73. The NGPRP was designed to "coordinate ongoing activities and build a policy framework which might help guide resource management decisions in the future." News Release, Oct. 3, 1972, App. 201. Pending its completion, the Secretary suspended a project, the Montana-Wyoming Aqueducts Study, designed to assess the availability of water for development of the vast coal resources. Fdg. 17, App. 194.

In addition to concern about development of the Province, the Secretary was also concerned about national development of a coal-leasing policy.⁵ In early 1973 he determined that a national impact statement on proposed federal coal leasing was necessary, and that pending issuance of this coal programmatic statement, no coal leases would be issued except pursuant to a short-term coal-leasing policy announced to the public on February 17, 1973.⁶ News Release, Feb. 17,

⁵ Since the enactment of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. (1970), federal coal lands have been available for leasing only, rather than for sale.

⁶ The suspension policy does not apply to federal approval of coal leasing plans on Indian lands. In fulfillment of its fiduciary responsibilities over those lands, the Department of the Interior will approve leases where the tribal or individual Indian landowner desires to dispose of the minerals, where the terms and conditions of the lease are in the best interest of the Indian landowner, where appropriate environmental safeguards are imposed on the lessee, and where NEPA's requirements have been met. Affidavit of Secretary Morton, App. 193; *see* App. 199; Fdg. 22, App. 240. Since the national coal leasing suspension order of Feb. 17, 1973, however, the Department has not approved any coal leases on Indian lands within the Province. Supp. Fdg. 3.

1973, App. 196; Affidavit of Secretary Morton, App. 191; Fdgs. 15-18, App. 237-239. The purpose of the coal programmatic statement, now in draft form, is "to provide a national overview of the impact of the entire Federal coal leasing program on the quality of the human environment." Affidavit of Secretary Morton, App. 191; Fdg. 15, App. 237-238. It will supplement, as necessary, "appropriate impact reporting on a regional basis or for individual leases." News Release, Feb. 17, 1973, App. 197. Besides suspending issuance of leases, the Secretary also determined to suspend issuance of any coal prospecting permits until further notice. Secretarial Order 2952, February 13, 1973, App. 198.

While these suspension policies are nationwide, they apply only to federal approval of mine leases and prospecting permits. As was suggested above, however, development of the Northern Great Plains to accommodate the coal mines is not so limited in scope. In recognition of the broader, yet inescapably environmentally related, activities accompanying coal development, the Secretary has sharply restricted federal approval of any related action in the Province pending issuance of the NGPRP interim report. According to Secretary Morton,

the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains will be held in abeyance pending the availability of the interim report from the NGPRP study or submitted to the Under Secretary for review and concurrence prior to execution.

Affidavit of Secretary Morton, App. 194; *see* Fdg. 25, App. 241. The draft interim NGPRP report was is-

sued September 27, 1974, Supp. Fdg. 5, and the final interim report is expected to issue in February 1975. Answer of Secretary Morton to Plaintiff's Revised Supp. Interrogatories, Ans. No. 24 (hereinafter Supp. Int. to Secretary Morton).

Despite Interior's announced moratorium on leases, prospecting permits, and other activities subject to its approval in the Province, some federal activity continues in the Northern Great Plains. Other federal agencies, all appellees here, are to some extent responsible. The Department of Agriculture has jurisdiction over issuance of rights-of-way over lands within the national forests, and the Army Corps of Engineers has jurisdiction over the navigable rivers. While both agencies refused to consider applications for permits or rights-of-way prior to June 30, 1974, they are now both accepting applications and willing to grant them. Agriculture has received four applications for rights-of-way over lands in the Northern Great Plains within the national forests,⁷ and the Corps of Engineers has pending one application for a right-of-way over navigable rivers within the region.⁸ Moreover, since June 30, 1974 the Corps has issued two permits for

⁷ All four applications are for rights-of-way over the Thunder Basin National Grasslands in Wyoming: by Wycoalgas Co. (water transmission line right-of-way); Rochelle Coal Co. (conveyor belt right-of-way); Atlantic Richfield Co. (plant site and railroad spur right-of-way); and Rochelle Coal Co. (railroad spur right-of-way). No action will be taken on any of these applications until the Forest Service of the Department of Agriculture determines whether an impact statement is necessary. If so, of course, no action will be taken until the impact statement is completed. Supp. Fdg. 4.

⁸ The pending application is from the Minnkota Power Corp. for a transmission line crossing the Missouri River near Price, North Dakota. *Id.*

structures in the navigable waters within the Northern Great Plains,⁹ and has pending two applications for such permits.¹⁰

More importantly, the announced restrictions placed by Interior on development of the Province have some large loopholes through which federal activity can proceed. In summary form, they are as follows: (1) the short-term leasing program applies only to new leases and does not interfere with the Department's ability to approve mining plans for pre-existing leases in the area; (2) some leases may be issued under the short-term leasing policy itself; and (3) federal activity in the Province is not really suspended pending issuance of the NGPRP, but rather can continue upon the approval of the Under Secretary. The first and third of these loopholes are the largest. In the states of Wyoming, Montana, North Dakota, and South Dakota (the four-state area),¹¹ there are 95 outstanding leases with a total acreage of 196,652 acres not subject to an approved mining plan; likewise there are nine outstanding leases on Indian lands with a total of 76,650 acres. Supp. Int. to Secretary Morton,

⁹ Permits were issued to the following: Square Butte Electric Co. (water intake structure for generating plant cooling, near Bismarck, North Dakota, issued Sept. 23, 1974); Ottertail Power Co. (removal of water intake structure for abandoned power plant near Washburn, North Dakota. Issued Oct. 15, 1974). *Id.*

¹⁰ Pending applications are from: Michigan-Wisconsin Pipeline Co. (water intake structure for coal gasification plant near Beulah, North Dakota); Consolidated Development Co. (water intake structure out of Oahe Lake for multiple purposes). *Id.*

¹¹ Some of the interrogatories are addressed to this four-state area rather than to the precise confines of the Province. See Supp. Int. to Secretary Morton. While another coal region, the Rocky Mountain Province, covers parts of Montana and Wyoming, there is no reason to suppose that the data thus presented is not useful for assessing, at least in a qualitative way, activity within the Northern Great Plains.

Ans. No. 14. Mining plans can be approved for these leases, and mining can begin thereon, upon the concurrence of the Under Secretary.¹² Since the short-term leasing policy began, at least four mining plans, one on Indian lands,¹³ have been approved, and approval of four more mines in the Eastern Powder River coal basin is pending.¹⁴ Environmental impact statements have been issued for most of these plans.¹⁵

¹² Interior must act affirmatively at three points before a mine can begin operations. First, it must issue a prospecting permit, which usually contains a preference right to any subsequent lease. Second, it must issue a lease. Finally, it must approve a mining plan. The first activity is now suspended, the second governed by the short-term leasing policy, and the third continues unimpeded.

¹³ Mining plans have been approved for leases held by the Anxas Coal Company in Campbell County, Wyoming (72 acres); Peabody Coal Company in Rosebud County, Montana (640 acres); Western Energy in Rosebud County, Montana (150 acres); and Westmoreland Resources in Harden County, Montana (245 acres). The Westmoreland lease is on Indian lands. Supp. Int. to Secretary Morton, Ans. No. 15.

¹⁴ Approval is pending of mining plans submitted by Atlantic Richfield Company, Carter Oil Company, Kerr-McGee Coal Corp., and Wyodak Resources Development Corp. While the Secretary has indicated his readiness to act on these plans, Supp. Int. to Secretary Morton, Ans. No. 31, action has been stayed by order of this court, pending resolution of this appeal. Order filed Jan. 3, 1975.

¹⁵ Impact statements have been issued for the plans submitted by Westmoreland Resources, Peabody Coal Company, and the four mines in the Eastern Powder River basin. See notes 13 & 14 *supra*. The validity of the Westmoreland statement was sustained in *Redding v. Morton*, Civ. No. 74-12-BLG (D. Mont., May 1, 1974), appeal pending, 9th Cir., No. 74-1984. The Eastern Powder River mines were considered together in one impact statement so that the cumulative effect of these related development plans could be analyzed. To assure full considera-

Approval is pending as well for eight other mining plans, one of which covers Indian lands, in the four-state area. Supp. Int. to Secretary Morton, Ans. No. 16. In addition to ongoing approval of mining plans, Interior has previously approved plans for 29 leases issued by the Bureau of Land Management (BLM), only half of which are operational.¹⁶ These mines can begin operation without further federal action.

Moreover, despite the short-term leasing program, there are exceptions to the leasing moratorium. The program allows a lease to be issued

(a) When coal is needed now to maintain an existing mining operation; or

(b) When coal is needed as a reserve for production in the near future;

(c) When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and

tion of total impact, the statement also considered the proposed issuance of a railroad right-of-way to Burlington Northern Inc. and the Chicago and North Western Transportation Company for a new railroad route between Gillette and Douglas, Wyoming to service the new mines. The final environment statement was issued to the Council on Environmental Quality (CEQ) on Oct. 18, 1974.

There has been no contention that any of these individual statements comprehensively study the regional impact of coal development in the Northern Great Plains, and our examination of the statements makes it clear that they do not do so. *Cf. Scientists' Institute for Public Information, Inc. v. AEC* (SIPI), 156 U.S. App. D.C. 395, 408-409, 481 F. 2d 1079, 1092-1093 (1973); *Natural Resources Defense Council, Inc. v. Morton*, 148 U.S. App. D.C. 5, 12-13, 458 F. 2d 827, 834-835 (1972). See also notes 23 & 36 *infra*.

¹⁶ See note 7 *supra*.

(d) When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act. News Release, Feb. 17, 1973, App. 196-197; Fdg. 18, App. 238-239. Since institution of the program, four leases have been issued throughout the nation, although none are in the Northern Great Plains. Supp. Fdg. 1. Nonetheless, there are 42 competitive lease applications pending in the four-state region for a total of 272,126 acres, and 80 preference right leases pending in the region for a total of 201,668 acres. Supp. Int. to Secretary Morton, Ans. Nos. 7 & 8. Interior has proved willing to apply the exception to the the leasing moratorium in the Northern Great Plains. On July 9, 1974 the Department offered for sale a lease covering approximately 320 acres south of Stanton, North Dakota. The lease was not issued only because no bids were received. Supp. Int. to Secretary Morton, Ans. No. 2. Despite the number of pending applications, however, Interior says it is not now considering offering any further leases in the Province under the short-term leasing program. *Id.*, Ans. No. 3. The Secretary anticipates that the short-term leasing program will continue in effect "at least until after the issuance of the final coal programmatic EIS and the development of a planning system to determine the size, timing and location of future coal leases."¹⁷ *Id.*, Ans. No. 4. The final coal programmatic statement is expected to issue shortly. *Id.*, Ans. No. 30.

Lastly, Interior has power over development of projects in the Northern Great Plains that are very

¹⁷ *Cf.* Hearings before the Subcom. on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 10, 17, 28 (1974) (statement of Ass't Sec. of Interior Horton that Department will end its short-term leasing policy in Sept. 1974).

closely tied to any future development of the Province's coal resources. These powers are not affected by the short-term coal-leasing policy, and are limited only by the Secretary's stated forbearance pending issuance of the NGPRP, a forbearance that evaporates upon the Under Secretary's approval of a stated project. Thus, in addition to the pending mining plans discussed above, there are now pending before the Department 14 applications for coal-related rights-of-way across the Northern Great Plains. *Id.*, Ans. No. 21. Two coal-related rights-of-way have been granted since June 30, 1974 in the four-state region, but both are outside the Northern Great Plains. *Id.*, Ans. No. 20. Additionally, a total of 41 applications are now pending before the Department, the Corps of Engineers, or both, for option contracts for water in the Province, although no such contracts have been executed since July 1971.¹⁸ Well over two million acre feet of annual water use are at stake. Supp. Fdg. 7.

In sum, there are pending applications for mine leases and mining plans, for rights-of-way over public lands, navigable waterways, and national forests, and for water rights in federally-controlled waters throughout the Northern Great Plains. Few such applications have been granted in the last two years as the Secretary has studied the preferred development of the region. Yet the time when action will be taken is close at hand. The final coal programmatic EIS and the final interim report of the NGPRP will issue shortly, if they have not issued already. The flood of applications will then be ripe for approval, and the massive development of the Northern Great Plains will begin.

¹⁸ One such application was denied in September 1973. Supp. Fdg. 7.

II

Plaintiffs-appellants are a collection of organizations interested in protection of the environment. They brought suit on behalf of themselves and their members, *see* *Sierra Club v. Morton*, 405 U.S. 727. 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), on June 13, 1973, charging that the Departments of the Interior, Agriculture, and the Army (the federal appellees) had authorized development of coal resources in the Northern Great Plains Region (the Region), defined as northeastern Wyoming, eastern Montana, and the western Dakotas, in violation of NEPA. Specifically, appellants charged that NEPA precluded development of the Region except after preparation of a comprehensive environmental impact statement, systematic interdisciplinary studies of coal development, and a study of appropriate alternative courses of action. 42 U.S.C. § 4332 (2)(A), (C), and (D). Appellants sought a declaratory judgment that NEPA was being violated, an injunction barring future federal action in the Region until the requirements of NEPA were met, and an order compelling the federal appellees to comply with NEPA. Complaint at 22-23, App. 22-23. A number of coal mining companies, utility companies, and the Crow Tribe of Indians (the intervenor appellees), all having interests in development of the Province, were allowed to intervene as defendants.

After limited discovery appellants moved, on August 31, 1973, for summary judgment. App. 66. The federal and intervenor appellees filed various cross-motions for summary judgment and judgment on the pleadings. App. 164, 168, 171. On February 14, 1974 the District Court denied appellants' motion for summary judgment and granted appellees' motions. While

finding, and reciting most of the facts outlined above, *see supra*, slip pages 731-737, — U.S. App. D.C. pages —, — F. 2d pages —, the District Court concluded that the Region, as defined in appellants' complaint, "is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action." Fdg. 7, App. 235. Moreover, despite the facts outlined above, "[t]here is no existing or proposed Federal regional program, plan, project, or other regional 'federal action' within the meaning of NEPA Section 102(2) for the development of coal or other resources" in the Region. Fdg. 8, App. 235 (emphasis in original). The court then held that in the absence of regional federal action, multiple applications for individual federal action in connection with individual private projects which are unrelated to one another except geographically do not either constitute regional federal action or mandate a regional impact statement. Conclusion of Law (Concl.) 4, App. 245. Likewise, NEPA Sections 102(2)(A) and (D) do not require a regional approach unless the federal action subject to those requirements is already regionally based. Concl. 5, App. 246. Finally, the court ruled that the NGPRP "is a study project and not a program for development," and, as such, it does not "ha[ve] life" within the meaning of NEPA. Concl. 9, App. 248. Even if a regional plan existed, the court ruled, NEPA would not prohibit proceeding with individual projects and, in any case, appellants would not be entitled to an injunction since they have not shown the likelihood of irreparable harm. Concl. 10 & 11, App. 248.

Appellants filed their notice of appeal on March 19, 1974. On March 26, 1974 the District Court denied ap-

pellants' motion for an injunction pending appeal, and appellants then filed, on April 12, 1974, a motion in this court for an injunction pending appeal and an expedited hearing. The motion for an expedited hearing was granted on June 17, 1974. While the court, Leventhal and Tamm, J.J., denied the motion for the broad injunction pending appeal because it lacked adequate knowledge of certain dispositive facts, it noted "the spectre of significant harm to large tracts of valuable wilderness still remains," and it urged the federal appellees to exercise "substantial restraint" in continuing development of coal resources in the Region lest the court's jurisdiction to decide the need for a comprehensive impact statement be, for all practical purposes, defeated. Order filed June 17, 1974.

Argument was scheduled for mid-October, but on October 14, 1974 the court, Leventhal and Nichols, J.J., ordered, *sua sponte*, argument rescheduled for December 17, 1974, meanwhile remanding the record to the District Court for a further evidentiary hearing designed to answer certain factual questions so as to make the record as current as possible.¹⁹ The parties

¹⁹ The supplemental questions were as follows:

1. Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been issued for lands in the Northern Great Plains region since February 17, 1973?

2. Is the suspension of the issuance by the United States of coal prospecting permits announced on February 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

3. To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973.

4. Have any applications for permits for rights-of-way over lands within national forests in the Northern Great Plains region been considered or acted upon by the Department of Agri-

were allowed to file supplemental memoranda concerning in the District Court's supplemental findings. The District Court has provided us with full answers to the certified questions, but has adhered to its original conclusions of law. Thus we may deem the court to have found these additional facts not inconsistent with its original conclusion. After oral argument we granted appellants' motion for a limited injunction pending this decision, and ordered the Secretary of the Interior, pending further order, to take no action concerning the mining plant and railroad rights-of-

culture since June 30, 1974? Have any applications for permits for rights-of-way over navigable rivers in the Northern Great Plains region been considered or acted upon by the Corps of Engineers since June 30, 1974?

5. Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

6. Does the United States Government contemplate the preparation of any further environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

7. What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

8. How was the area to be covered by the EIS for the development of coal resources in the Eastern Powder River Coal Basin defined, and how was it determined that an EIS was appropriate for that area?

9. Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after February 17, 1973, or prepared for projects that were commenced after that time—a. Provide one or more representative statements. b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area? c. Do the statements take into account the ecological setting created by private action in the area? d. Has the government devised any procedure for cross-referencing among the individual statements?

Order, Oct. 14, 1974.

way ready for approval in the Eastern Powder River coal basin and discussed in the Eastern Powder River EIS. Order filed January 3, 1975. Having the benefit of the District Court's original and supplemental findings, and the original briefs and supplemental memoranda of the parties, we must now turn to the merits.²⁰

²⁰ We can dispose here of two preliminary defenses raised by appellees and given credence by the District Court, namely, whether this case presents a justiciable case or controversy, and whether appellant organizations have standing to sue. The District Court held that "the courts will not review the validity of supporting statements or studies until final Federal actions taken under NEPA Section 102(2) and until after final agency action has been taken with respect to the individual project," *Concl. 7, App. 247*, and that, therefore, no case or controversy had been stated. *Concl. 8, App. 247*. While the court is correct that as a general proposition of law NEPA challenges to individual projects can be brought only after final agency approval of a project, *see e.g., Committee to Stop Route 7 v. Volpe, D.Conn., 346 F.Supp. 731 (1972)*, the court seems to assume that (1) only individual actions can be challenged, and (2) appellants do not allege that final actions have occurred. Both of these assumptions are erroneous, and we find that appellants have stated a case of controversy.

First, as will be made clear in text below, *SIFI* firmly holds not only that a comprehensive program can be challenged under NEPA, but that the suit does not have to be brought via an attack on an individual action. Even though the AEC's Liquid Metal Fast Breeder Reactor (LMFBR) program was only in "the research and development stage and no specific implementing action which would significantly affect the environment had yet been taken," *SIFI, supra* note 15, 156 U.S.App.D.C. at 398, 481 F.2d at 1082, the court found the program "has life," which, for purposes of NEPA, was sufficient to make a case or controversy.

"The instant case is ripe under these principles since the issue tendered for review is whether an impact statement on the AEC's LMFBR program is *presently* required under NEPA.

* * * In the context of a long-range program such as is in-

volved here, judicial review of compliance with NEPA is necessary at stages at which significant resources are being committed, lest the statute's basic purpose be thwarted."

156 U.S.App.D.C. at 403 n. 29, 481 F.2d at 1086 n. 29 (emphasis in original). As we shall make clear below, we think appellees' plans to control development of the Northern Great Plains have sufficient life to state a case or controversy.

Second, appellants allege that appellees' conduct in the Northern Great Plains constitutes a "major federal action," so that a NEPA statement is required. Actions, both past and imminent, have been alleged. While the courts will typically not rule in NEPA cases until after the agency decision to act, the essence of appellants' complaint is that appellees have already decided to act, although they have not admitted as much. Again, *SIFI* is directly in point. *SIFI* recognized, necessarily, the propriety of judicial intervention in determining the dictates of NEPA. While it spoke expressly only of judicial determination that the time for an EIS was ripe, 156 U.S.App.D.C. at 410, 481 F.2d at 1094, the principle and *SIFI's* holding apply as well for judicial determination that the Government is engaged in "major federal action." Therefore, while in the first instance it is for the Government to decide whether an impact statement is necessary, where the Government improperly fails to treat the cumulative effect of individual actions as a "major federal action" it is appropriate for the courts to intervene, and do so sufficiently early that the purposes of NEPA are not thwarted.

We think that in a case like this, where appellants allege the individual federal steps taken in the Northern Great Plains, considered together, constitute a major federal action, a case or controversy is stated when the challenged individual actions are alleged, along with a reasonable basis for treating them cumulatively under NEPA, and there is a claim that "significant resources are being committed." 156 U.S.App.D.C. at 403 n. 29, 481 F.2d at 1086 n. 29. We think appellants have met this test. As in *SIFI*, the issue they raise is "whether an impact statement on [development of the Northern Great Plains] is *presently* required under NEPA." *Id.* (emphasis in original). On this issue, there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). *See also*

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); Eccles v. Peoples Bank, 333 U.S. 426, 434, 68 S.Ct. 641, 92 L.Ed. 784 (1948); Ashwander v. TVA, 297 U.S. 288, 324, 56 S.Ct. 466, 80 L.Ed. 688 (1936). Thus we think a justiciable case or controversy has been stated and the District Court erred in holding otherwise. Of course, the fact that appellants do not fully prevail on the merits does not operate, retroactively, to expunge the controversy.

The second preliminary issue concerns appellants' standing to sue. Appellants alleged, Complaint ¶¶ 3-9, App. 3-5, and the District Court found, that "[m]any members of plaintiff organizations live, work, engage in recreational activities, own land and hold surface rights on or immediately adjacent to the sites of coal mining and related activities in the four-state area * * *."

Fdg. 1, App. 233. Appellants further alleged that development of coal resources in the Northern Great Plains would cause direct harm to various of their members' economic, environmental, recreational, and aesthetic interests in the Region. Complaint, ¶¶ 10, 37, App. 5, 20-21. Such "injury in fact," if proved, plainly meets the broad test of standing outlined in *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), and applied in *United States v. SCRAP*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973). See also *SIPI*, *supra* note 15, 156 U.S. App. D.C. at 403 n. 29, 481 F. 2d at 1086 n. 29. In this case, however, standing can be deemed to have been proved only by appellant Northern Plains Resource Council (NPRC). The issue of standing as to all appellants was raised by the denials of the federal appellees, and of various intervenor appellees as well. Answer of federal appellees, ¶¶ 3-10, 37, App. 100, 109. See, e.g., answer of intervenor Nebraska Public Power District, ¶¶ 3-4, App. 138-139. Nonetheless, except for the NPRC, no appellant introduced any evidence to prove its standing, and the District Court made no express finding that any appellant had standing, presumably because there was no challenge to appellants' standing in appellees' motion for summary judgment. Of course, standing to sue is an essential element of a cause of action and must be "demonstrated" as well as "alleged," particularly where controverted. *SIPI*, *supra* note 15, 156 U.S. App. D.C. at 403 n. 29, 481 F. 2d at 1086 n. 29. See also *United States*

III

NEPA's applicability to the cumulative effect of individual actions was an early issue in the impact

v. *SCRAP*, *supra*, 412 U.S. at 689-690, 93 S. Ct. 2405. On remand to the District Court appellants may introduce evidence of their standing to allow the District Court the opportunity to rule on the issue if appellees continue to deny it. Cf. *Sierra Club v. Morton*, *supra*, 405 U.S. at 735 n. 8, 92 S. Ct. 1361.

NPRC introduced into evidence two affidavits from its Vice Chairman, Christopher Muller. The affidavits related directly to the proposed Westmoreland Resources coal mine on Crow-ceded land. See note 15 *supra*. Muller identifies those members of his organization who reside in the vicinity of the proposed mine and the adverse environmental, aesthetic, and economic effects on those members of continued construction of the mine. Affidavits of Christopher Muller, Nov. 7, 1973 and Dec. 21, 1973. While appellees attempted to controvert the Muller affidavits with the affidavit from W. J. Connelly of Westmoreland Resources asserting that the adverse effects on appellants were minimal, Affidavit of W. J. Connelly, Jan. 11, 1974, it is clear that minimal "injury in fact" is sufficient for standing. *United States v. SCRAP*, *supra*, 412 U.S. at 688-690, 93 S. Ct. 2405. See also *New Jersey Chapter, Inc., A.P.T.A., Inc. v. Prudential Life Ins. Co.*, 163 U.S. App. D.C. —, —, 502 F. 2d 500, 504 (1974) ("Standing need not be founded on a rock; a pebble or even a cobweb may do.") That there will be at least minimal injury is uncontroverted. Of course, the fact that an impact statement has been approved for the Westmoreland mine, see note 15 *supra*, does not affect appellants injury, nor does it deprive them of standing to seek a comprehensive statement for the entire Region, since the injury caused them by development of the Westmoreland mine is part of the injury regional development would cause. Since appellant NPRC has demonstrated "injury in fact," and since it does not appear to be contested that the injury is within the zone of interests intended to be protected by NEPA, see *Data Processing Service v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970), and *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970), we hold that NPRC had standing to bring the suit below, and to bring this appeal.

statement cases, and has continued to require definition to date.²¹ An environmental impact statement is only required, of course, for "proposals for legislation and other *major Federal actions* significantly affecting the quality of the human environment * * *." Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (emphasis added). While the meaning of "legislation" is fairly clear, the precise content of "major Federal actions" is often open to question, and was, apparently purposely, enacted by Congress without definition. When an individual project—a dam, a highway, a parking plan—crossed the boundary line from minor to major action was the first issue presented to the courts, and it was one capable of fairly ready resolution. *See, e.g.*, *Scherr v. Volpe*, 7 Cir., 466 F. 2d 1027 (1972); *Citizens Organized to Defend Environment, Inc. v. Volpe*, S.D. Ohio, 353 F. Supp. 520 (1972); *Monroe County Conservation Council, Inc. v. Volpe*, 2 Cir., 472 F. 2d 693 (1972); *Crary v. Morton*, D.D.C. (Civ. No. 75-1023, order issued Feb. 11, 1975).

More difficult, but also readily resolved, was the question whether the cumulative effect of various federal actions, all individually minor, could together constitute a "major federal action." The courts, aided by the Guidelines of the Council on Environmental Quality (CEQ), the body established by NEPA to review agency compliance with Sections 101 and 102 of

²¹ A related problem, essentially the converse of this one, is determining when a major action should be segmented into smaller actions so as to allow filing an impact statement for the smaller actions. *See, e.g.*, *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 5 Cir., 446 F. 2d 1013 (1971); *Natural Resources Defense Council v. Morton*, D.D.C., 388 F. Supp. 829 (1974); *Committee to Stop Route 7 v. Volpe*, *supra* note 20. *Cf.* *Indian Lookout Alliance v. Volpe*, 8 Cir., 484 F. 2d 11 (1973).

the Act, 42 U.S.C. § 4344(3), have consistently held that the purposes of NEPA would be violated if an impact statement were not required in such cases. The Guidelines make clear that the statutory term "major Federal actions" must be assessed "with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated." 40 C.F.R. § 1500.6(a) (1974). *Cf.* 36 Fed. Reg. 7724 (1971) (the original guidelines).²² The Guidelines further explain how minor federal actions can be "cumulatively considerable."

This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about future courses of action, or when several Government agencies individually make decisions about partial aspects of a major action.

40 C.F.R. § 1500.6(a) (1974). This interpretation of the statutory term is eminently reasonable, both because NEPA plainly mandates comprehensive consideration of the effects of all federal actions, 42 U.S.C. § 4332(2)(A), which consideration would be defeated if impact statements were required only for *individual* projects of "major" size, and because any other inter-

²² Although the CEQ Guidelines lack the force of law, we should "not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,' * * * has misconstrued NEPA." *Greene County Planning Board v. FPC*, 2 Cir. 455 F. 2d 412, 421, cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972). *See* note 24 *infra*.

pretation would provide an escape hatch, through agency subdivision of "major" projects, from the impact statement requirement.

Almost every project can be divided into smaller parts, some of which might not have any appreciable effect on the environment. The court would be forced to take each project apart piece by piece * * *.

People of Enewetak v. Laird, D. Hawaii, 353 F. Supp. 811, 821 (1973). Thus the courts have had no difficulty in requiring impact statements for "major Federal actions" that were no more than the cumulative effect of related minor federal actions. *See e.g.*, *Natural Resources Defense Council v. Grant*, E.D.N.C., 341 F. Supp. 356, 367 (1972); *People of Enewetak v. Laird*, *supra*; *Minnesota PIRG v. Butz*, D. Minn., 358 F. Supp. 584, 622 (1973); *SCRAP v. United States*, D.D.C., 346 F. Supp. 189, 200 (1972) (three-judge court), reversed on other grounds, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) ("the necessity of preparing an impact statement cannot be avoided or postponed * * * by breaking [the action] into minute component parts"). *Cf.* *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 5 Cir., 446 F. 2d 1013, 1022 1023, cert. denied, 403 U.S. 932, 91 S. Ct. 2257, 29 L. Ed. 2d 711 (1971).

The next problem to reach the courts involving cumulative impact of related activities was also the logical next step. If the cumulative effect of individually minor federal actions could constitute a major federal action, could the cumulative impact of admittedly major federal actions do so as well? Even if individual impact statements were being prepared for

the individual actions, would a comprehensive statement for the cumulative action also be necessary? The answer was provided by this court's *SIPI* decision. Finding no distinguishing principle separating assessment of the cumulative impact of individually minor actions from the cumulative impact of individually major actions, we held that NEPA's impact statement requirement is not limited to individual projects. Rather, in *SIPI* we demanded that the Atomic Energy Commission prepare a comprehensive impact statement for its Liquid Metal Fast Breeder Reactor (LMFBR) program, even though an individual statement had been prepared for the one existing fast breeder demonstration plant and even though the Commission planned to issue an individual statement for each future plant and test facility within the program.

The Commission takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed, quite the contrary is true.

156 U.S. App. D.C. at 402-403, 481 F. 2d at 1086 1087. *See also* *Natural Resources Defense Council v. Morton*, *supra* (emphasizing the need for comprehensive environmental planning). *SIPI's* approach is firmly echoed by a contemporaneous First Circuit decision. In *Jones v. Lynn*, 1 Cir., 477 F. 2d 885 (1973), the court held that preparation of impact statements on individual buildings within an urban renewal project would be both impractical and, unless the individual statement evaluated the "cumulatively significant impact" of the entire federal role in the project, in violation

of NEPA. Instead a comprehensive statement was required.

[I]t would not seem sensible to adopt the piecemeal approach which HUD seeks to adopt, whereby it will prepare a modified impact statement separately for each proposed construction as a mortgage insurance application is filed, an approach akin to equating an appraisal of each tree to one of the forest.

Id. at 891. *See also* Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 2 Cir., 508 F. 2d 927 (1974).

We think *SIFI*'s holding that statements are necessary for "broad agency programs" in addition for "broad agency programs" in addition to "particular facilities" was firmly based, and we reaffirm it here. We do not understand appellees to dispute *SIFI*'s validity. In fact, we note that, in compliance with the CEQ Guidelines and with *SIFI*, Interior has itself decided a national coal programmatic statement is necessary to assess the broad impact of its national coal development policy.²³ Likewise, when confronted with applications for approval of four mining plans and a railroad right-of-way in one subregion of the Northern Great Plains, the Eastern Powder River coal basin, Interior properly decided to assess the cumulative environmental impact of the individual

²³ It is not suggested by appellees that this national programmatic statement is sufficiently detailed to substitute for a regional statement covering the Northern Great Plains, and our examination of the draft statement makes it clear that it is not. *Cf.* Natural Resources Defense Council v. Morton, *supra* note 21. For the limitations of the national statement, *see* Draft Environmental Impact Statement, Proposed Federal Coal Leasing Program at I-6, I-7. *Cf.* note 15 *supra*.

projects through a regional impact statement. *See* note 15 *supra*.

In *SIFI* the AEC admitted it was engaged in the LMFBR program. We must now decide whether to extend *SIFI* to require comprehensive impact statements in situations where the responsible agencies deny they are engaged in a broad program. Appellants would have us hold that an impact settlement is necessary in this case "precisely because the federal agencies have not prepared any plan for coal development in the Northern Great Plains." Appellants' brief at 47. They rely primarily on the following provision from the CEQ Guidelines:

Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the over-all impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments). Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement.

40 C.F.R. § 1500.6(d)(1)(1974) (emphasis added). Appellants read these guidelines to require a comprehensive impact statement whenever a group of individual federal projects are related geographically, environmentally, or programmatically. After extensive

analysis of federal activities in the Northern Great Plains, appellants conclude "the projects and federal actions relating to coal development in the Northern Great Plains region are related in all three of these ways." Appellants' brief at 33: Appellees argue that a statement is required only when the Government has itself designated the activities at issue a "program." They claim the CEQ Guidelines support this approach arguing that reference to the need for "broad program statements" means the Guidelines only define when broad statements are needed in pre-existing programs. Intervenor appellees' brief at 31 n. 1.

We reject appellees' constricted reading of the Guidelines. Whether a comprehensive impact statement is required cannot turn simply on whether the agency has denominated a comprehensive series of actions a "program." This argument is analogous to that in the early NEA cases when agencies denied that related minor actions constituted, *in toto*, a major action. We did not hesitate at that time in holding that major actions were involved despite the agency denials; where appropriate, we will not hesitate now. The fact of an agency denial does not end the controversy, but rather points to why the controversy exists. Surely the result in *SIFI* would have been no different had the AEC simply denied that a comprehensive program was involved, all the other underlying facts being the same. At a minimum, the courts must reserve the right to analyze federal actions to determine if, in fact, a comprehensive program, however labeled, is under way or proposed. See *SCRAP v. United States*, *supra*, 346 F. Supp. at 200.

This conclusion is firmly supported by the recent Second Circuit decision in *Conservation Society of Southern Vermont, Inc. v. Secretary of Transporta-*

tion, supra. In *Conservation Society* the court upheld the determination of the District Court that the Department of Transportation could not proceed with improvement of a 20-mile segment of U.S. Route 7 until a comprehensive impact statement was prepared for the entire 280-mile length of Route 7. The District Court so held, although it acknowledged that there was no present plan for overall development of the road; it found, however, that ultimate conversion of Route 7 into a superhighway was a goal held by the federal defendants and that it was "possible of accomplishment with legislative and federal approval over a long-range period of time * * *." D. Vt., 362 F. Supp. 627, 636 (1972). Since ultimate conversion was the expectation of the federal defendants, and since completion of the 20-mile segment at issue would constitute an irreversible and irretrievable commitment of resources that would generate more traffic and thereby create synergistic pressure for further construction, the District Court ruled that major federal action was proposed within the meaning of Section 102(2)(C), and that the time was ripe for a comprehensive impact statement. The Second Circuit agreed.

While we thus feel firmly grounded in inquiring into the actual nature of the Government's actions, appellants would have us go further than this. Essentially, they would have the courts require filing of a comprehensive impact statement if a comprehensive program *should be* under way. Admittedly, the CEQ Guidelines, which are entitled to great respect,²⁴ do seem to sweep that broadly. Moreover, there

²⁴ "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13

are dicta in the cases suggesting that the duty to plan comprehensively can be imposed on the Government apart from the duty to file an impact statement for comprehensive plans. For instance, *Natural Resources Defense Council v. Morton*, *supra*, suggests:

What NEPA infused into the decision-making process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, *a comprehensive approach to environmental management*, and a determination to face problems of pollution "while they are still of manageable proportions and while alternative solutions are still available" rather than persist in environmental decision-making wherein "policy is established by default and inaction" and environmental decisions "continue to be made in small but steady increments" that perpetuate the mistakes of the past without being dealt with until "they reach crisis proportions." S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) p. 5.

L. Ed. 2d 616 (1965). See also *Rosado v. Wyman*, 397 U.S. 397, 415, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970); *Zuber v. Allen*, 396 U.S. 168, 192, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969). While CEQ is not strictly charged with administration of NEPA it is charged with the duty of reviewing and appraising agency compliance with the statute, and so is entitled to deference, 42 U.S.C. § 4344(3). This deference is heightened when, as here, the administrative interpretation is adopted soon after passage of the legislation. *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408, 81 S. Ct. 1529, 6 L. Ed. 2d 924 (1961); *United States v. Zucca*, 351 U.S. 91, 96, 76 S. Ct. 671, 100 L. Ed. 964 (1956); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). Accordingly, the courts have consistently deferred to CEQ guidelines. See *SIFI*, *supra* note 15, 156 U.S. App. D.C. at 402-404, 481 F. 2d at 1086-1088; *Greene County Planning Board v. FPC*, *supra* note 22, 455 F. 2d at 421; *Environmental Defense Fund v. TVA*, 6 Cir., 468 F. 2d 1164, 1178 (1972). See note 22 *supra*.

148 U.S. App. D.C. at 14, 458 F. 2d at 836 (emphasis added). Viewed broadly, this language plainly contemplates imposing a requirement of comprehensive planning on the Government when it refuses to do so itself. Indeed, NEPA does declare it federal policy "to use all practicable means * * * to improve and coordinate Federal plans, functions, programs and resources" in order to protect the environment. Section 101(a), 42 U.S.C. § 4331(a). NEPA's substantive provisions may be enforced in court as well as its procedural requisites.²⁵ See *Calvert Cliffs' Coordinating Committee v. AEC*, *supra*, 146 U.S. App. D.C. at 38, 449 F. 2d at 1114. Agency violation of this substantive duty by a failure to improve its plans or coordinate its actions might justify a judicial directive to coordinate various major federal actions into one comprehensive major federal action, followed by a directive ordering issuance of a comprehensive impact statement for that newly-comprised action.

While we approve, in theory, the legal basis for appellants' argument, we note the practical difficulties in its broad application. An infinite number of geo-

²⁵ Six circuits have found that agency action in violation of the substantive provisions of NEPA may be enjoined. However, the action must be found to be arbitrary or capricious. See *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 146 U.S. App. D.C. 33, 39, 449 F. 2d 1109, 1115 (1971); *Environmental Defense Fund v. Corps of Engineers*, 8 Cir. 470 F. 2d 289, 300 (1972); *Sierra Club v. Froehlke*, 7 Cir. 486 F. 2d 946, 953 (1973); *Conservation Council of North Carolina v. Froehlke*, 4 Cir., 473 F. 2d 664, 665 (1973); *Silva v. Lynn*, 1 Cir., 482 F. 2d 1282, 1283 (1973); *Jicarilla Apache Tribe of Indians v. Morton*, 9 Cir. 471 F. 2d 1275, 1281 (1973). *Contra*, *National Helium Corp. v. Morton*, 10 Cir., 455 F. 2d 650 (1971). Thus an agency could not be found to have failed to plan comprehensively in violation of NEPA unless that failure was so gross as to be arbitrary and capricious.

graphic, environmental, or programmatic interrelationships might be found among the various individual federal projects under way throughout the country. Surely, however, an infinite number of comprehensive plans, and comprehensive impact statements, are not required. Moreover, the Guidelines are intended to guide agency planners in the need for impact statements. It is, of course, the agencies that are supposed to organize the various federal projects throughout the country, not litigants who come into court seeking, possibly in opposition to one another, to force the agencies into action according to their lights; one might seek, for instance, a coal impact statement for the Northern Great Plains, another for the four-state region, and another for the state of Wyoming alone. Use of NEPA to force a comprehensive plan on an unwilling agency as a means to force that agency to undertake a comprehensive impact statement might intrude unduly on agency discretion, while overly involving the courts in the day-to-day business of running the Government.

This is not to say appellants' claim is without merit. We have noted above the persuasiveness of their legal arguments. Since the courts would only find an agency to be in violation of the substantive provisions of NEPA if its failure to plan comprehensively was arbitrary or capricious, the dangers suggested above would be minimized.²⁶ And there may be instances where judicial intervention is justified. Surely we are not willing to hold that the less comprehensive planning an agency chooses to do, the less NEPA requires it to do. Such a *reductio ad absurdum* would make a mockery of the Act. However, we need not decide ap-

²⁶ See note 25 *supra*.

pellants' claim here. We think the facts in the record and as found by the District Court establish that regional development of the Northern Great Plains is contemplated by the federal appellees. The proposal for such development would constitute a proposal for major federal action within the meaning of Section 102(2)(C) and demand issuance of a comprehensive regional impact statement.

It is beyond question that federal action within the meaning of the statute includes not only action undertaken by the agency itself, but also any action permitted or approved by the agency. *SIFI*, *supra*, 156 U.S. App. D.C. at 404, 481 F. 2d at 1088. Approving leases to private parties and granting licenses or permits to private parties are familiar—and well-established—examples of major federal actions. *See, e.g.*, *Davis v. Morton*, 10 Cir. 469 F. 2d 593 (1972); *Greene County Planning Board v. FPC*, *supra*; *Scenic Hudson Preservation Conference v. FPC*, 2 Cir., 453 F. 2d 463 (1971); *Calvert Cliffs' Coordinating Committee v. AEC*, *supra*. It is clear, and we do not understand the federal appellees to contest it, that most, if not all, of the ongoing and pending actions in the Northern Great Plains are subject to federal approval and are thereby federal actions. That these actions are major and that they significantly affect the human environment is also not contested. Certainly actions in the Region subject to Section 102(2)(C) include the approving of mining plans, the granting of rights-of-way across federal lands, and the granting of water rights from federal reservoirs. Thus the relevant question is not whether major federal actions are being taken in the Northern Great Plains, nor is it whether impact statements are necessary for those actions. The question is whether the federal appellees have treated those

actions regionally in such a way that they comprise, cumulatively, a major federal action.

We believe the evidence mandates an affirmative answer.

The evidence is overwhelming that the federal appellees have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains. The North Central Power Study, the Montana-Wyoming Aqueducts Study, and the Northern Great Plains Resources Program were all undertaken for this purpose. The purpose of the aborted North Central Power Study was "to promote the coordinated development of electric power supply in the North Central United States." *Id.*, Report of Phase I, Volume I, at 2 (1971). The "key resource" for development of that power supply was coal. *Id.* The stalled Aqueduct Appraisal Report, after recommending construction of large-capacity aqueducts to serve the industrial needs resulting from development of the coal fields, concluded:

The apparent impact of the development will require that full-scale comprehensive studies be initiated in the near future, in cooperation with the states and others, to assure an orderly and manageable growth pattern to minimize adverse environmental effects and impacts.

Id. at 31 (1972). Now the NGPRP is under way, an interagency, federal-state task force whose primary objective is "to provide information and a comprehensive analysis that can be used to place the potential impacts of coal development into perspective and thereby assist the people of the Northern Great Plains and the Nation in the management of the natural and human resources of this region." NGPRP Draft Interim Report at I-4 (1974). Secretary Morton tells

us that all three of these programs were "attempts to control development by individual companies." Affidavit of Secretary Morton, App. 190. The District Court accepted this assertion as fact. Fdg. 14, App. 237.

The need for comprehensive regional development of the Northern Great Plains was recognized by responsible officials in the various agencies that subsequently became involved in the NGPRP. On May 2, 1972 Secretary of Agriculture Butz wrote to the Administrator of the Environmental Protection Agency with reference to coal development in the Northern Great Plains: "We agree that a comprehensive, systematic, and interdisciplinary study of all aspects of the development and use of our coal reserve is needed." App. 75. On July 6, 1972 he wrote to Senator Mansfield, again with reference to the Northern Great Plains: "[T]here is considerable urgency and need for a coordinated mineral development strategy." App. 74. Likewise, on November 2, 1972 the Chief of the Forest Service wrote to Senator Mansfield concerning coal leasing in the national forest in the Region. He reported that "a prerequisite to further leasing should be a plan for coordinated development consistent with adequate environmental protection and the public interest." App. 78, 119 Cong. Rec. 1504 (1973). The same year Assistant Secretary of the Interior for Public Land Management Harrison Loesch told a congressional committee that "[w]e are presently investigating the necessity, and we think it is a necessity, of rather comprehensive study and planning effort in the large coal basins of Montana and Wyoming." Federal Leasing and Disposal Policies, Hearing Before the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess., 85 (1972).

The NGPRP is the federal response to these expressed concerns. It is the Government's attempt to formulate a regional program that will enable it to control development of the Northern Great Plains. This is demonstrated not only by the stated goals of the program itself, *see slip op. at 747, 748 supra*, — U.S. App. D.C. at —, — F. 2d at —, but by the suspension of activity in the Region pending its completion, by the comments of responsible officials, and by the findings of the District Court. In setting up the NGPRP in 1972, Secretary Morton described it as "an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resources development with proper regard for environmental protection." App. 200; *see slip op. at 733 supra*, — U.S. App. D.C. at —, — F. 2d at —. In responding to questions about development of the Region posed by a congressional committee, Interior provided this statement:

An assurance of orderly and timely development would require an analysis and assessment of such items as regional coal demand and the relationship to existing leases. The Department is initiating a State, local and Federal program to develop a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formations. The objective is the wise development of the region accomplished in full realization of social, economic and ecological consequences of alternative possibilities.

Federal Leasing and Disposal Policies, Hearing Before the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess., 189 (1972). The program mentioned obviously was the NGPRP. Lastly, the Dis-

trict Court found that the interim report of the NGPRP

will provide an informational foundation for decision-making and planning. This information will be utilized in decision-making for all coal related actions in the Northern Great Plains areas and will form a useful reference source for preparing environmental analyses and statements on proposed actions or groups of actions in the Northern Great Plains area.²⁷

However, while the NGPRP does attempt to provide a framework for decision-making to allow the federal government to control development of the Northern Great Plains, it plainly recognizes the need, which it does not fill, for cumulative study of the environmental impact of that development.²⁸ The draft

²⁷ The court also found "The purpose of the Department of Interior policy with respect to resource development in the Northern Great Plains Areas is to insure that development does not proceed based solely on single purpose studies incapable of developing comprehensive information or by piecemeal actions which restrict future options. To fulfill that purpose the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains areas will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary of Interior for review and concurrence prior to execution." Fdg. 25, App. 241.

²⁸ The Environmental Protection Agency has also recognized the need for cumulative environmental consideration of the Region. Exercising his statutory and regulatory duty to review and comment on major agency actions to which § 102(2)(C) applies, *see* 42 U.S.C. § 1857h-7(a). 40 C.F.R. § 1500.9(a) (1974), the EPA Administrator, in identical letters to the Secretaries of the Interior and Agriculture, stated with regard to development of the Northern Great Plains: "Environmental im-

interim report asks, "Is the impact of two mines or powerplants in the same area twice as great as the impact of one, or is it larger?" It warns, "[T]he impacts of coal development in the Northern Great Plains may be greater than the projection and analytic techniques used have been able to delineate." NGPRP Draft Interim Report at V-2. The NGPRP does not purport to provide answers to these problems. We believe, however, that NEPA requires those answers be found.

Impact statements prepared on a project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and spirit of the National Environmental Policy Act."

App. 82.

The dissent suggests the various projects contemplated in the Northern Great Plains are essentially independent of one another, so that a commitment to one project entails no consequences for another. Thus there is no need for comprehensive environmental planning, and *SIPI* and *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 2 Cir., 508 F.2d 927 (1974), are inapposite. Dissent slip op. at 761-763 *infra*. — U.S.App.D.C. at —, — F.2d at —. We disagree. To cite two examples beyond those suggested above, the availability of water and manpower in the Region is limited. Coal mining is crucially dependent upon both. Thus development of one mine is considerably more than an irretrievable commitment to that mine. In the case of water supply, it forecloses the possibility of another, environmentally preferable mine. In the case of manpower, it creates pressure for a population influx which, while minor for one mine, may be cumulatively considerable. As *SIPI* and *Conservation Society* tell us, it is these sorts of environmental effects that can be best addressed in a regional, comprehensive manner. See also note 31 *infra*.

It is our view that when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to "control redevelopment" of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a "plan," a "program," or nothing at all. Thus, supported by the *Conservation Society* precedent and based on the evidence presented to the District Court and the facts as found by the District Court, we hold that comprehensive major federal action is contemplated in the Northern Great Plains. The District Court's contrary conclusion of law was in error.²⁹

²⁹ The cases relied upon by appellees and the District Court to show that no impact statement is required for a regional plan such as the NGPRP are all inapposite. Every cited case involved the propriety of an injunction against an individual project pending completion of a regional EIS or other study. None of the cases involved a direct challenge to the need for a regional EIS. See *Sierra Club v. Callaway*, 5 Cir., 499 F.2d 982 (1974); *Jicarilla Apache Tribe of Indians v. Morton*, *supra* note 25; *Indian Lookout Alliance v. Volpe*, *supra* note 21; *Sierra Club v. Stamm*, 10 Cir., 507 F.2d 788 (1974); *Trout Unlimited v. Morton*, 9 Cir., 509 F.2d 1276 (1974); *Environmental Defense Fund v. Armstrong*, N.D.Cal., 356 F.Supp. 131, *aff'd*, 9 Cir., 487 F.2d 814 (1973); *Movement Against Destruction v. Volpe*, D.Md., 361 F.Supp. 1360 (1973); *Sierra Club v. Froehlke*, S.D.Tex., 359 F.Supp. 1289, 1324-1325 (1973); *Conservation Council of North Carolina v. Froehlke*, M.D.N.C., 340 F.Supp. 222, 227 (1972), *remanded*, 4 Cir., 473 F.2d 664 (1973).

Of course whether an injunction will issue in such a case depends on many factors in addition to whether a regional EIS is required, including the state of construction of the challenged project and the comprehensiveness of the impact statement for that project. See *Sierra Club v. Callaway*, *supra*, 499 F.2d at 987. Thus whether a regional EIS is required was not determin-

ative for resolution of the cited cases. Moreover, many of the cases did not even raise the issue of a regional impact statement, but merely sought delay of an individual project until completion of a regional *study* that might be of some assistance in preparing the individual statement. This was the situation in *Jicarilla Apache Tribe of Indians v. Morton*, *supra*, note 25, relied on most heavily by appellees. There plaintiffs sought to delay four individual coal-fired electric generating projects in four southwestern states pending issuance of the Southwest Energy Study. The court sensibly rejected the claim: "If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated." 471 F.2d at 1280. Even appellees concede that there was no claim made in *Jicarilla* that a region impact statement was necessary. Intervenor appellees' brief at 28.

Likewise, in *Environmental Defense Fund v. Armstrong*, *supra*, also heavily relied upon by appellees, the need for a regional statement was not at issue. Plaintiffs there sought a "comprehensive study," not an EIS, of the Central Valley Project before approval of the New Melones dam impact statement. The court refused to wait for the study, noting that "no comprehensive study has been commenced, let alone completed." 356 F.Supp. at 139. This is in sharp contrast to this case where a comprehensive study is under way, and the need for a comprehensive statement is at issue.

In *Sierra Club v. Callaway*, *supra*, the Fifth Circuit refused to delay the Wallisville Project pending a comprehensive EIS for the entire Trinity Basin Project. The holding was based on its findings that Congress intended the two projects to be treated separately, that the Wallisville Project was not, in fact, a component of the Trinity Basin Project, that the Wallisville Project was 72% complete while the Trinity Basin Project might not be completed for 40 to 50 years, and that the Wallisville Project was well under way before the effective date of NEPA. Thus *Sierra Club v. Callaway* is full distinguishable; there was no comprehensive plan at all.

This crucial dependence upon the facts of the case was stressed in *Sierra Club v. Stamm*, *supra*, also heavily relied upon by appellees. Whether the Strawberry Aqueduct and Collection System was itself a major federal action or merely a component of

the larger Bonneville Unit, or the entire Central Utah Project, was a question of fact as well as law, and turned crucially on "the 'facts' as * * * found by the trial court * * *." 507 F.2d at 791. The Tenth Circuit agreed "with the trial court that the Strawberry system in and of itself constitutes a 'major Federal action' and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system before work may be commenced on the Currant Creek Dam."

Id. at 792-793. Again we note this case was in the context of a challenge to the individual project and did not involve the question whether a comprehensive EIS was necessary on its own merits. Moreover, the Tenth Circuit found the facts sufficient to treat the Strawberry System apart from the overall project. To the extent, however, that the Tenth Circuit proceeded on the assumption that only one "major Federal action" could be found, either the entire Bonneville Unit, the entire Central Utah Project, or the Strawberry System, we disagree. It is clear to us that a major federal action may require an impact statement for itself and still be a part of a larger major federal action that also requires a statement. That was the holding of *SIFI*, and we adhere to it. To the extent *Sierra Club v. Stamm* is contrary, we decline to follow it.

The last important case cited to us by appellees is *Trout Unlimited v. Morton*, *supra*. There the Ninth Circuit held that an EIS prepared for the First Phase of the Lower Teton Division of the Teton Basin Project was adequate despite the fact that it did not attempt to analyze the environmental impacts of the Second Phase. The court distinguished the case before it from cases requiring comprehensive impact statements by noting that the First Phase was "substantially independent" of the Second, that approval of the Second was not a foregone conclusion since approval of the Secretary of the Interior and the Congress had yet to be obtained, and that the First Phase would be fully functional even if the Second were never built. We think those distinguishing factors fully distinguish *Trout Unlimited* from the instant case where the thrust of appellants' complaint is that widespread development of the Northern Great Plains is virtually certain to occur, and that the effects of the individual projects can only be meaningfully assessed in cumulative terms.

IV

Our conclusion that major federal action is contemplated in the Northern Great Plains does not mean, *ipso facto*, that a comprehensive regional impact statement is required. A statement must precede the "recommendation or report on *proposals* for * * * major Federal actions." Section 102(2)(C), 42 U.S.C. § 4332 (2)(C) (emphasis added). This raises the question of timing that was so critical in *SIPI*. We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus we think it proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe. *SIPI*, *supra*, 156 U.S. App. D.C. at 409-410, 481 F. 2d at 1093-1094. We should note, however, that the "ripeness" necessary before a statement is required is slight. Preparation of a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action. An impact statement is designed to aid agency decision-making, not provide an *ex post facto* justification for it. We fully adhere to our statement in *Calvert Cliffs' Coordinating Committee v. AEC*, *supra*, that

[c]ompliance [with NEPA demands] that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental

and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.³⁰

146 U.S. App. D.C. at 42, 449 F. 2d at 1118. But, as *SIPI* tells us,

[W]e are pulled in two directions. Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decision making process.

156 U.S. App. D.C. at 410, 481 F. 2d at 1094.

The problem *SIPI* notes with regard to research and development programs applies with like force to defining any "proposal" within the meaning of Section 102(2)(C). *SIPI* identified four balancing factors that must be analyzed and weighed to determine if the time is ripe for an impact statement. *Id. Cf.* 40 C.F.R. § 1500.6(d)(2). With minor modifications to make the factors applicable to all federal actions and not just the research and development program at issue in *SIPI*, we adopt those factors here. Thus the agency, or the reviewing court, should inquire as follows: How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?

³⁰ Compliance with the substantive demands of § 102(2)(A) and (D) is required, of course, even before an impact statement is necessary under § 102(2)(C).

As we pointed out in *SIPI*, application of this test is in the first instance a task for the agency, in answering the questions, and balancing the answers, clearly requires agency expertise. *See id.* *See also* *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n of D.C.*, 155 U.S. App. D.C. 233, 239, 477 F. 2d 402, 408 (1973); *Wilderness Society v. Morton*, 156 U.S. App. D.C. 121, 145, 479 F. 2d 842, 866 (1973) (*en banc*). While judicial scrutiny of an agency decision that the time is not yet ripe for a statement is, of course, appropriate, *SIPI*, *supra*, 156 U.S. App. D.C. at 410, 481 F. 2d at 1094, our analysis of the balancing factors is inconclusive at this time and, because we are told that appellees are about to resolve certain dispositive uncertainties, we remand this case to the District Court to allow the federal appellees initially to make their own determination.

We find from the record from the District Court ample evidence suggesting that, as for two of the balancing factors, the time for a statement is indeed ripe. Meaningful information on the effects of development of coal resources in the Northern Great Plains, and of alternatives to that development, is certainly available, although not yet compiled and analyzed. Of course it is the mere availability of such information that matters; compilation and analysis are the purpose of the impact statement itself.³¹ Like-

³¹ The extreme importance of prompt analysis of the effects of massive coal development of the Northern Great Plains is emphasized by the NGPRP, which does not attempt to engage in such detailed analysis: "Considerable uncertainty remains regarding the socio-economic impacts of coal development in the Northern Great Plains. Because of the complex nature of coal development, it is extremely difficult to estimate or assess cumulative impacts. However, these impacts may be critical. Is the impact of two mines or powerplants in the same area twice as great as the impact of one, or is it larger? Furthermore, how

wise the severity of the environmental effects of massive coal development of the Northern Great Plains is clear and inclines us toward a finding of ripeness. There is no need to expound on the effects here.³² Briefly put, a region best known for its abundant wildlife and fish, and for its beautiful scenery, a region isolated from urban America, sparsely populated and virtually unindustrialized, will be converted into a major industrial complex.

Weighing the other two balancing factors is not so clear-cut. While federal approval of development of the Northern Great Plains seems fairly certain to occur, and to occur in the relatively near future so as to lessen our dependence on imported oil, it seems to us clear that the Government has not yet finally settled on its role in granting that approval. Significantly, the relevant geographic area for development still seems somewhat uncertain.³³ Interior's broadly con-

adaptable is the socio-economic environment? Do equal increments of change require equal adjustments or do they require successively more? It is quite possible that the impacts of coal development in the Northern Great Plains may be greater than the projection and analytic techniques used have been able to delineate. NGPRP Draft interim Report, at V. 2."

³² The effects are described vividly in appellants' brief, and we do not understand appellees to contest their magnitude. *See* appellants' brief at 11-18.

³³ Thus, while the NGPRP covers the five states of Montana, Wyoming, North Dakota, South Dakota, and Nebraska, its projected development of the area covers only northeastern Wyoming, eastern Montana, and the western Dakotas. *See, e.g.*, NGPRP Draft Interim Report, Plate 5B, Most Probable Development Forecast [*sic*]. The North Central Power Study, on the other hand, encompassed a significantly larger area, while the Aqueduct Study covers only Montana and Wyoming. We think that, absent abuse of this power, definition of the proper region for comprehensive development and, therefore, the com-

ceived North Central Power Study collapsed, and it responded with the Northern Great Plains Resources Program. While the NGPRP is intended to guide the Government in controlling private development of the Region, the interim report is not yet completed. As the Government grapples with its role in the Northern Great Plains, it has largely suspended activity therein. Thus so long as the suspension stays in effect, irretrievable commitments are largely being avoided while appellees determine the scope of the proposed federal action.³⁴ On the other hand, the suspension is not abso-

prehensive impact statement should be left in the hands of the federal appellees.

The appellees make something of an issue of the differences between the area covered by the NGPRP and the area described by appellants in their complaint. Intervenor appellees' brief at 23-24, 43-45; federal appellees' brief at 4 n. 1. The District Court also found significance in these discrepancies, ruling: "The 'Northern Great Plains region' as described by the plaintiffs is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action."

Fdg. 7, App. 235 (emphasis added). We find this argument to be without merit. In a case such as this, where appellants seek to have the Government acknowledge that it is treating the comprehensive development of a region as a whole, we deem it unnecessary for the complaint to define every acre of territory within the region being so treated by the Government. Precise definition of the region is one of the consequences of such a lawsuit, not a prerequisite for it. The complaint should be sufficiently precise to put the Government on notice of the scope of plaintiff's claim. That was clearly achieved here; indeed, the planning maps of the NGPRP released after initiation of this suit revealed the area defined by the appellants to describe virtually precisely the area actually considered for development by the NGPRP.

³⁴ It is the lack of definition of the proposal for action and the suspension of activity in the region that crucially distinguish this case from *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, *supra* note 28, *see slip op. at*

lute; four mining plans have been approved in the past two years and four more are ready for approval, stayed only by our temporary injunction.

Thus analysis of the four balancing factors is somewhat inconclusive, inclining us simultaneously toward a finding of ripeness and a desire to stay our hand while appellees further define their roles. However, we find it unnecessary to reach a conclusive resolution of the question at this time, for the uncertainties inclining us toward restraint are about to be resolved. We are told that the final interim report of the NGPRP is about to be issued; indeed, it may have issued already. According to the federal appellees, they will then feel free to begin approving private activity in the Northern Great Plains. We think the federal appellees will also be in a position, upon issuance of the interim report, to decide more definitely upon their role in the development of the Northern Great Plains,³⁵ and we think we should await their definition. If, as has been their goal, that role is one of controlling

745-746, *supra* — U.S. App. D.C. at —, — F. 2d at —. In *Conservation Society* the scope of the proposed action was clear—the entire 280-mile length of Route 7—and irretrievable commitments—the 20-mile segment under construction—were being made that would determine the course of future action. Thus the proposal was sufficiently ripe to demand preparation of a comprehensive impact statement.

³⁵ It is admitted that the federal appellees intend to use the NGPRP to help define the need and scope of future impact statements in the Northern Great Plains. Supp. Fdg. 6.

The fact that appellees' plans to control development of the Northern Great Plains may not spring full-blown from issuance of the NGPRP interim report is, of course, of no consequence. The impact statement is intended to aid agency planning and decision-making *before* the final recommended proposal for action is made. It is enough that the scope of the proposal is sufficiently clear that consideration of its environmental impact is possible.

development of the region, then, as we have made clear above, a comprehensive EIS should accompany the proposal for action, which presumably would be embodied in a final NGPRP report.³⁶ If, contrary to expectations, the federal appellees settle upon another role in the development of the Northern Great Plains, or upon no role at all, they must decide whether an impact statement is required.³⁷ If they decide in the negative, we will require "a statement of reasons why [they believe] that an impact statement is unnecessary."³⁸ *Arizona Public Service Co. v.*

³⁶ If the federal appellees decide to prepare a comprehensive regional EIS for the Northern Great Plains, it is, of course, of no consequence to us what form it takes. The EIS may be incorporated in already planned statements for individual projects, it may be subdivided into subregional statements, or it may be issued as a whole. All that matters is that a comprehensive study of the region is made. *SIPI*, *supra* note 15, 156 U.S. App. D.C. at 408-409, 481 F. 2d at 1092-1093; *Natural Resources Defense Council v. Morton*, D.D.C., 388 F. Supp. 829 (1974). *See* notes 15 & 23 *supra*.

It is likewise of no concern whether the appellees jointly prepare a comprehensive statement or whether they each prepare their own, so long as the cumulative effect of *all* the contested federal actions are fully assessed.

³⁷ We note that an impact statement might be required for the negative decision *not* to control development of the Northern Great Plains, as well as for the positive decision to do so. *See Arizona Public Service Co. v. FPC*, 157 U.S. App. D.C. 272, 280 n. 24, 483 F. 2d 1275, 1282 n. 24 (1973); *City of New York v. United States*, E.D.N.Y., 337 F. Supp. 150, 160 (1972) (three-judge court) (Friendly, J.).

³⁸ While we will allow the federal appellees, in the first instance, to make the decision whether a regional impact statement is necessary for the Northern Great Plains, we remind them that the requirements that such a statement issue for major federal action, even if regional in character, and that environmental factors be considered at every state of agency decision-making about such action are not inherently flexible

FPC, 157 U.S. App., D.C. 272, 279, 483 F. 2d 1275, 1282 (1973). *See also SIPI*, *supra*, 156 U.S. App. D.C. at 410-411, 481 F. 2d at 1094-1095; *Hanly v. Klein-dienst*, 2 Cir., 471 F. 2d 823 (1972), cert. denied, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973). Accordingly, we remand this case to the District Court. The federal appellees must decide within 30 days of issuance of the NGPRP Interim Report, or the date of this opinion, whichever is later,³⁹ whether to prepare a comprehensive, programmatic impact statement for the Region, and they must report their decision, and the reasons for it, to the District Court.⁴⁰ If appellees decide against attempting to control development of the Northern Great Plains, they must also

or discretionary. *See Calvert Cliffs' Coordinating Committee v. AEC*, *supra* note 25, 146 U.S. App. D.C. at 38, 449 F. 2d at 1114. *But see* note 36 *supra*.

³⁹ Should, for some reason, the NGPRP interim report not issue within a reasonable time after the date of this opinion, appellants may petition this court for a further order.

⁴⁰ Secretary Morton seems to have conceded that some sort of regional or subregional statement will be necessary. "It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner. Until those decisions are reached no new coal leases will be issued except pursuant to the short-term leasing policy. The interim report from the NGPRP * * * will provide an information foundation for decision-making and planning."

Affidavit of Secretary Morton, App. 194-195. We agree that the NGPRP will provide a basis for making the decision whether to prepare a comprehensive impact statement for the Northern Great Plains. We only order that the Secretary, guided by our interpretation of the procedural and policy requirements of NEPA, make that decision.

report, in detail, what the federal role in the Region will be. *See Arizona Public Service Co. v. FPC, supra*, 157 U.S. App. D.C. at 280, 483 F. 2d at 1282. Appellants will be able to challenge appellees' impact statement decision and, if appellees decide not to prepare a comprehensive statement, to present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement.

V

Since we refer back to appellees the decision whether to prepare a comprehensive impact statement for the Northern Great Plains, we continue our temporary injunction of January 3, 1975 until that decision is reached. This will preserve, in large part, the *status quo* pending appellees' decision. While we do not order issuance of any more comprehensive injunction at this time, we note that our decision to refer the issue of a regional EIS to appellees for resolution in the first instance is prompted in large part by appellees' forbearance in authorizing activity in the Region pending issuance of the NGPRP. In this regard, we have two observations. First, while Interior's interim policy seems to have been embarked upon with considerable good faith, we would have more confidence in it if the escape hatch were not quite so large. As matters stand, requests for approval of any activity within Interior's jurisdiction in the Northern Great Plains

will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary for review and concurrence prior to execution.

Affidavit of Secretary Morton, App. 194 (emphasis added). No standards at all are suggested by which

the Under Secretary will grant his concurrence. We think it would be appropriate, particularly if this policy were to continue following a decision to prepare a comprehensive impact statement, for the Secretary to determine and publish standards by which this significant exception will operate. Moreover, the remaining federal appellees' policy of forbearance seems to have dissolved, although they have actually approved few actions in the Region. *See slip op. at 734-735 supra*, — U.S. App. D.C. at —, — F. 2d at —. We think it would be appropriate for these appellees to adopt a policy similar to Interior's.

Second, as we noted in denying appellants' motion for a preliminary injunction last spring, the spectre of significant, and unnecessary, harm to large tracts of valuable wilderness still remains. The number of applications for federal approval of various activities is large. We urge appellees, while deciding whether to prepare a comprehensive impact statement for the Northern Great Plains, to take no actions that would defeat the purpose the impact statement is designed to serve. Needless to say, however, the courts remain open, to appellants or others, should the federal appellees decide nonetheless to approve any private endeavors in the Northern Great Plains.

Whether an injunction against activity, either ongoing or proposed, in the Northern Great Plains should issue pending preparation of a comprehensive regional impact statement is a question we need not reach.⁴¹ We note only that a responsible policy of

⁴¹ The District Court concluded that even if a regional impact statement were required appellants had shown no irreparable harm that would justify an injunction barring activity in the region until the statement were completed. Concl. 11, App. 248. In this regard, we direct the court's attention to this court's recent decision in *Jones v. District of Columbia Redevelopment*

restraint by the federal appellees with respect to authorizing such activity might make the question moot.

VI

This case has presented difficult questions involving the proper balance between an agency's discretion in deciding whether, and when, to issue an environmental impact statement, and the judiciary's role in overseeing exercise of that discretion. We believe that, to the fullest extent possible, it is for the agency to implement the demands of NEPA. While the courts should not shirk their role, it is the responsible compliance of the federal agencies that will make environmental planning a day-to-day occurrence and that will make the needless abuse of our priceless national heritage a nightmare of the past. We are confident the agencies will not lose, or misuse, this opportunity.

Reversed and remanded.

MACKINNON, Circuit Judge (dissenting):

In the foregoing opinion, the majority has remanded this case with instructions that it be held in abeyance pending the issuance of a "study" presently being prepared by the Federal appellees. It is anticipated that the release of the study will enable the various agencies involved to decide within 30 days thereafter whether "a comprehensive, programmatic impact statement for the Region"¹ is necessary. Since I conclude that a regional environmental impact statement (EIS) is not presently required in these circum-

Agency, 162 U.S. App. D.C. 366, 376, 499 F. 2d 502, 512 (1974), which makes clear that the harm to be considered in issuing an injunction in NEPA cases matures at the time an impact statement becomes necessary but is not filed.

¹ Majority Op. at 755, — U.S. App. D.C. at —, — F. 2d at —.

stances, I find no need to remand the case for further proceedings and accordingly dissent from the action of the majority.

The only immediate practical effects of the majority's decision is to continue the temporary injunction as ordered by this court on January 3, 1975, in order to "preserve * * * the *status quo*."² My objections to the continuance of this injunction are the same as were indicated in my dissent to the original order. See *Sierra Club v. Morton*, 167 U.S. App. D.C. —, 509 F. 2d 533, 534-36 (1975).

I

The trial court concluded that appellants' complaint failed to present a justifiable case of controversy because

the courts will not review the validity of supporting statements or studies until final federal actions [are] taken under NEPA section 102 (2) and until after final agency action has been taken with respect to the individual project.³

While the majority concedes that "as a general proposition of law NEPA challenges to individual projects can be brought only after final agency approval of a

² *Id.*

³ Conclusions of Law, ¶ 7, App. 247, citing *Scientists' Institute for Pub. Info. v. AEC*, 156 U.S. App. D.C. 395, 481 F. 2d 1079, 1091 (1973); *Natural Resources Defense Council v. Morton*, 148 U.S. App. D.C. 5, 458 F. 2d 827, 836 (1972); *Coalition for Safe Nuclear Power v. AEC*, 150 U.S. App. D.C. 118, 463 F. 2d 954, 955 (1972); *Thermal Ecology Must Be Preserved v. AEC*, 139 U.S. App. D.C. 366, 433 F. 2d 524, 526 (1970); *Gage v. Commonwealth Edison Co.*, 356 F. Supp. 80, 86 (N.D. Ill. 1972); *Sherry v. Algonquin Gas*, 4 ERC 1713, 1714 (D. Mass. 1972).

project," it interprets *Scientists' Institute for Public Information, Inc. v. AEC (SIPI)*, 156 U.S. App. D.C. 395, 481 F. 2d 1079 (1973), as holding that a challenge to a comprehensive program need not be made through an attack on an individual project.⁴ As indicated hereafter, the record in this case does not establish the existence of any comprehensive *regional* program of the type found in *SIPI* which could justify requiring the preparation of a regional environmental impact statement at this time. However, even if one concedes that such a statement might be appropriate, the District Court was still correct in concluding that an action divorced from the review of a statement covering an individual project is not a proper means for the determination of appellants' claims.

In deciding that the instant case is a proper vehicle for raising a claim for a regional EIS, the majority has overlooked the required relationship between the statements prepared on individual projects and the "regional" statement appellants seek. If appellants are correct in asserting that NEPA requires the preparation of a regional EIS before any development of the Northern Great Plains may proceed, then all the statements covering individual projects necessarily must be at present insufficient to comply with NEPA. Conversely, if an EIS on an individual project is found to comply with NEPA, it necessarily follows that NEPA does not require the preparation of a more comprehensive statement before that project may proceed.

Impact statements have already been issued for the Westmoreland mine, the Peabody Coal Company project, and four mines and a railroad right-of-way in the

⁴ Majority Op. at n. 20.

Eastern Powder River Basin. See Supp. Finding on Remand, ¶ 9a. Of these, the Westmoreland EIS was found to be sufficient under NEPA in *Redding v. Morton*, Civ. No. 74 12-BLG (D. Mont., May 1, 1974), appeal pending, 9th Cir. No. 74 1984, and the remaining statements apparently have not yet been challenged in court.⁵ My dissent to the issuance of the temporary injunction states, and I continue to believe, that the proper method to use in assessing the need for a regional statement is for appellants to file an appeal challenging the sufficiency of the EIS covering an individual project.⁶ Appellants' apparent inability to successfully challenge the statements on individual projects as too limited in scope is strong, if not compelling, evidence that a "comprehensive regional EIS" is not required at this time.

II

The starting point for any discussion of the need for an environmental impact statement is of course sec-

⁵ Appellants' argument that it would be "inconvenient" for them to attack specific federal actions does not merit serious consideration by this court.

⁶ The majority asserts: "There has been no contention that any of these individual statements comprehensively study the regional impact of coal development in the Northern Great Plains, and our examination of the statements makes it clear that they do not do so."

Majority Op. at n. 15. However, the real question in this case is whether such a comprehensive study is necessary here. As here indicated, this is merely another form of the inquiry into the sufficiency of statements on individual projects. Since the sufficiency of the individual statements was not litigated before the District Court, if the majority intended this statement as a finding based on its own examination that they are insufficient to support the projects they cover, it would be exceeding the permissible scope of appellate review.

tion 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C):

(2) all agencies of the Federal Government shall—

* * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The crucial question here is whether the Federal appellees have "proposed" "major federal actions" which require the preparation of an EIS covering all coal-related development in the "Northern Great Plains Region."

⁷ Appellants' complaint described the area in issue as "northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota." App. 2. By a stroke of luck, this vague "region" roughly conformed with the 63 county area which the Northern Great Plains Resources Program (NGPRP) study later identified as the area in which development was likely to occur. However, the conclusion that a region has potential for developments is a far cry from a declaration that the federal government is undertaking a program of coordinated development of the region. The District Court correctly concluded: "The 'Northern Great Plains region' as described

To place this case in perspective, it is important to keep in mind exactly what is not at issue. The federal appellees do not deny that they are taking actions related to coal development within this region. On the contrary, several projects are admitted to be in various stages of development, and the agencies have consistently prepared impact statements prior to taking action.⁸ Nor is there any contention that the projects which have been approved or which may be approved in the future are not "major." Furthermore, the agencies have consistently required that the EIS on each project consider the cumulative environmental impacts of related developments.⁹ Where appropriate,

by the plaintiffs is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action." Finding of Fact, 7, App. 235. Permitting appellants to define their own region for purposes of this action raises the clear possibility that other potential plaintiffs could seek an infinite progression of "regional" statements covering "regions" of their own choice, thus seriously disrupting any attempt by the federal appellees to deal with the development of a critical national resource. The majority recognizes the danger posed by its decision to allow appellants to maintain this action (Majority Op. at 745-747, — U.S.App.D.C. at —, — F.2d at —, —) but declines to give the District Court any guidance on whether it must allow new plaintiffs to maintain suits seeking to compel, for example, the preparation of statements covering all coal deposits in the nation or covering a single Basin in the Northern Great Plains Province, both of which "regions" have also been the subject of various studies. This entire problem could be avoided simply by requiring appellants to challenge a particular federal action, thus enabling the court to evaluate the extent of the environmental impact from that action and define the region accordingly.

⁸ See, e. g., the impact statements prepared for the Westmoreland Resources and Peabody Coal Company mines.

⁹ The Preface to the Final Environmental Impact Statement on the Eastern Powder River Coal Basin, Vol. I, illustrates

they have prepared impact statements which consider together several related developments within an area.¹⁰

the considerations used by the federal appellees in determining the necessary scope of an EIS: "Further, to meet the intent of the Act in the most productive fashion, it is necessary to examine the general geographic area of the proposed and potential actions. The geographic area for basic consideration is that part of the Powder River Coal Basin in Wyoming lying generally eastward from the Powder River to the outcrop line of the coal resource and from somewhat north of Gillette to a point somewhat south of Douglas. The area delineation is based in part on present and anticipated levels of mining activity, differing quality of the coal resource, different physical arrangement of the coal beds, somewhat different mining techniques required and differing physical reclamation requirements. These considerations having a broader scope of geographic impact such as social conditions, economic factors, atmospheric influence, water resources, and recreation uses are treated on a larger regional basis than the primary study area. This statement discusses the existing environment, evaluates the collective impact of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area described above. This statement also examines in detail certain proposed activities for which federal actions are required."

¹⁰ See, e. g., the Final Environmental Impact Statement for the Eastern Powder River Coal Basin, which covers four mines and an associated rail right-of-way. More recently, Interior has released a draft EIS for the Belle Ayr South Mine of the Amax Coal Company, also located in the Eastern Powder River Basin. The Preface to that document states:

"In January 1974, the Departments of Interior and Agriculture and the Interstate Commerce Commission decided that, under provisions of Section 102 of the National Environmental Policy Act of 1969, an environmental impact statement must be prepared before any decision could be made on pending proposals for major development of federally-owned coal in the Eastern Powder River Basin of Wyoming. At that time, there were four major strip mine plans pending approval before the Department of the Interior. There was also pending before

"Part I of that final environmental impact statement (hereinafter designated FES 74-55) was devoted to a regional analysis encompassing the existing environment, all projected coal development and the cumulative effect of this development on the environment. Parts II through VI of the FES specifically dealt with the four mine plans and the construction of the railroad.

"Due to the increased nationwide demand for low sulphur coal for the generation of electricity, it was anticipated that a number of large strip coal mines, in addition to those four mines considered in Parts III through VI of FES 74-55, would also be proposed for development of Federal coal leases in the near future in the Eastern Powder River Coal Basin. Accordingly, the regional analysis of FES 74-55 included data and information from every proposed operation known to be under consideration by the various leaseholders in the study area. In this way the cumulative impacts of the total potential development could be assessed. Subsequent to initiation of preparatory efforts for FES 74-55 and prior to its filing in final form, other proposed mining and reclamation plans for development of existing Federal coal leases in the

the Interstate Commerce Commission proposed construction of a railroad some 113 miles in length, between the Belle Ayr Mine spur southeast of Gillette, Wyoming, and Douglas, Wyoming. This railroad was to serve the coal mines proposed to be developed along the proposed right-of-way in the basin. The construction of this railroad line, the four mining proposals, as well as a number of other anticipated or possible future coal-related developments and all their impacts on the environment, were evaluated in an environmental impact statement entitled "Proposed Development of Coal Resources in the Eastern Powder River Basin of Wyoming." The final statement was filed with the Council on Environmental Quality by the Department of the Interior on October 18, 1974.

area were filed for approval with the Geological Survey, Department of the Interior, as required by law.

"Because of the submission date, these plans could not be included for site specific analyses in FES 74-55. In the assessment which follows, the site specific aspects of the proposed mining and reclamation plans for the South Belle Ayr Mine of the Amax Coal Company, are analyzed using information and data previously published in FES 74-55 together with information gained from field observations and company reports. Part I of FES 74-55 is incorporated herein by reference."

What appellants present to this court is a claim that all these good faith efforts on the part of the various agencies are not sufficient to satisfy the demands of section 102(2)(C). To carry out the alleged requirements of NEPA, appellants assert that before any development in the region may be allowed to go forward, the agencies concerned must first prepare a "comprehensive" analysis of the environmental impacts of all present and potential development within the region.

III

By reversing the decision of the District Court, the majority is indicating its belief that there is some substantial possibility that appellant's claims will ultimately be successful. To reach this conclusion, the opinion reasons that major federal action can be combined to create a new major federal action for which an EIS is necessary. Its authority for this proposition is this court's decision in *Scientists' Institute for Public Information, Inc. v. AEC (SIPI)*, 156 U.S. App. D.C. 395, 481 F. 2d 1079 (1973) and the Second Circuit decision in *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F. 2d 927 (2d Cir. 1974). There is no doubt *SIPI* holds that

a comprehensive statement may be required in *certain circumstances* but like any holding it is colored by its facts and its reasoning. The difficulty arises in the application of that decision to the facts here.

The crucial consideration which justified the requirement of a statement covering more than an individual project in both *SIPI* and *Conservation Society* was the presence of irretrievable commitments of resources beyond what was actually expended in an individual project. In *SIPI*, each development in the Liquid Metal Fast Breeder Reactor Program made it more unlikely that the agency could in the future abandon its investment in favor of some alternate energy source:

The manner in which we divide our limited research and development dollars today among various promising technologies in effect determines which technologies will be available, and what type and amount of environmental effects will have to be endured, in the future when we must apply some new technology to meet projected energy demand.

481 F. 2d at 1090. Similarly, the court found in *Conservation Society* that the construction of a 20-mile segment of highway would generate traffic and thus create pressure for further construction along the entire route and foreclose consideration of alternatives to highways.

Phrasing these decisions in terms of the potential "regional" development at issue in the instant case, it is clear that the courts in *SIPI* and *Conservation Society* found that a federal action at one point in the "region" would cause a ripple effect which would eventually have an impact on future federal actions elsewhere in the "region." Because of this effect, each court determined that the agency involved was required to prepare a comprehensive statement for the

entire "region" before it could approve an individual project within the "region".

The reason for the above holdings becomes clear when one considers the purpose underlying the preparation of impact statements. Virtually every federal action "significantly affecting the quality of the human environment" will necessarily involve some irreversible and irretrievable commitment of resources. NEPA only requires that the agency disclose these environmental costs and consider them in arriving at a decision; it does not prevent an agency from proceeding with a project if the benefits outweigh the costs disclosed in the EIS. Thus where the only irretrievable commitments of resources are those directly associated with an individual project, an impact statement covering that project is sufficient to enable the agency to act. However, in situations where the decision on one federal project was found to presently cause irretrievable commitments on future projects or the foreclosure of future options, this court and the Second Circuit quite properly found that an EIS for the entire project was necessary before the initial step could be taken.¹¹

¹¹ The Ninth Circuit recently arrived at a similar interpretation of *SIPI*: "Nor is Scientists' Institute for Public Information v. Atomic Energy Comm'n, 156 U.S.App.D.C. 395, 481 F. 2d 1079 (1973) particularly pertinent here. There an EIS was required for continued research and development on the AEC's Liquified Metal Fast Breeder Reactor (LMFBR) Program covering foreseeable environmental effects if such a reactor were put into future use. The LMFBR has no independent significance absent such future uses. The court was careful to emphasize that its decision to require an EIS was based in large part upon the significance of the overall reactor program as a radical change in the manner in which the entire nation produces electricity. See 481 F. 2d at 1089." *Trout Unlimited v. Morton*, 509 F. 2d 1276, 1285 n. 13 (9th Cir. 1974).

Applying the above analysis, the instant case is readily distinguishable from both *SIPI* and *Conservation Society*. Any coal-related federal action will undoubtedly require certain associated developments. For example, the approval of a mining plan will most probably require the granting of rail rights-of-way and the construction of housing facilities for mine employees. However, these are direct consequences of the initial action, and the agencies involved have always taken the position that such impacts must be considered in the EIS which precedes approval of the mining plan. This record is devoid of the type of commitment of "regional" resources which justified the results in *SIPI* and *Conservation Society*. Developments in one part of the Northern Great Plains are essentially independent from developments elsewhere in the region. For example, the decision to permit mining of sub-bituminous coal in Wyoming to which the Federal Government has the mineral rights, in no way commits Interior to approving proposals for mining lignite, similarly owned by the United States, in North Dakota. Even within each of the Basins which comprise the Region, development of some portion of the coal reserves does not irretrievably commit the federal agencies to permit development of the entire reserve. Furthermore, it is clear that even the largest of the proposed projects will not have an environmental impact on the entire Northern Great Plains Region. It may indeed be the case that widespread development of this area will eventually occur, but the impetus for that development will come from the nation's need for

coal and not from the fact that partial development of the region has been allowed.¹²

IV

If *SIPI* and *Conservation Society* were the only relevant decisions, the majority's arguments might have some appearance of validity. However, several courts have considered arguments such as those advanced by appellants, in cases which presented facts that were considerably closer to the instant case than *SIPI* and *Conservation Society*, and have determined that a "regional" EIS was unnecessary before individual projects within the "region" could be approved. *See Trout Unlimited v. Morton*, 509 F. 2d 1276 (9th

¹² The Majority Opinion at n. 28 cites two "examples" of how it contends the various present and potential developments are interrelated—the availability of water supplies and manpower resources in the region. Actually, the use of the term "manpower" is a misnomer since what the majority is really talking about is the pressure of the influx of necessary additional manpower on the area. Insofar as one mine creates pressure for a population influx, that is just one more factor to be considered in the EIS for that particular project. However, the opening of that mine in no way commits the agencies to authorizing other mines which would require the importation of additional manpower not already in the area at a future date. With respect to water resources, there is no showing here that the strip mines, which presently are the only projects actively being developed, have sufficient impact on regional water resources to foreclose future alternatives. The proper time to consider such problems will be when the agencies move to a proposed type of development which does tax regional resources. If there is insufficient water for a particular type operation, then that type operation would not be used. In any event, this entire discussion points up the importance of appellants' failure to show at any point in this record that the EIS on any particular project has failed to adequately consider all relevant environmental impacts.

Cir. 1974); *Sierra Club v. Stamm*, 507 F. 2d 788 (10th *Cir.* 1974); *Sierra Club v. Callaway*, 499 F. 2d 982 (5th *Cir.* 1974); *Environmental Defense Fund v. Armstrong*, 356 F. Supp. 131 (N.D. Cal.), *aff'd*, 487 F. 2d 814 (9th *Cir.* 1973); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F. 2d 1275 (9th *Cir.* 1973); *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360 (D. Md. 1973).

In its attempt to evade the clear holdings of these cases, the majority dismissed them with the assertion that:

Every cited case involved the propriety of an injunction against an individual project pending completion of a regional EIS or other study. None of the cases involved a direct challenge to the need for a regional EIS.

Majority Op. at n. 29. This is a classic example of a distinction without a difference. Surely, it is not reasonable to suggest that the decisions reached by other courts are somehow less sound because they were able to assess the need for a regional EIS in the context of a challenge to the sufficiency of a specific statement whereas this court is considering a challenge in the abstract without ever determining that a particular EIS does not comply with the dictates of NEPA. If any inference can be drawn from the majority's distinction, it would be that the cited cases are entitled to considerably more weight than this court's decision in the instant case.

In *Jicarilla*, *supra*, the court rejected contentions that impact statements issued in connection with each of several coal-fired electric generating projects in four southwestern states violated NEPA because they were issued prior to the completion of a Southwest Energy Study by the Interior Department. The ma-

jority is correct in pointing out that the plaintiffs in *Jicarilla* were specifically seeking delay pending the completion of a "study" rather than delay pending the preparation of a regional EIS, but rather than forming the basis of a distinction, this fact emphasizes its similarity to the instant case. The Southwest Energy Study "was designed to evaluate the problems created by further development of coal-fired electric power in the Southwest;" (471 F.2d at 1279), a purpose quite similar to that of the Northern Great Plains Resources Program study. The Majority opinion at this point apparently overlooks the fact that its opinion ultimately does *not* direct the preparation of a regional EIS for the Northern Great Plains but rather just arrests development within the region until the study issues, at which point the need for a regional EIS would be assessed. The Ninth Circuit found that this sort of delay was not mandated by NEPA, and my conclusion on the facts of this case is to the same effect.

In *Environmental Defense Fund v. Armstrong*, *supra*, the Ninth Circuit affirmed a District Court decision rejecting an argument that an EIS covering the New Melones Dam project was inadequate because it did not include a "comprehensive study" covering the entire California Central Valley Project. Although the plaintiffs once again requested only a study and not a regional EIS, the language of the District Court is instructive:

Under these circumstances there is no requirement under NEPA that the EIS with respect to the New Melones Project be delayed until a comprehensive study of the Central Valley Project be completed. So long as each major federal action is undertaken individually and not as an indivisible, integral part of an

integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. Plaintiffs' suggestion that there is need for a comprehensive study of the Central Valley Project should be made to the Congress, and not to the Court.

356 F.Supp. at 139. As is stated above, the federal actions related to coal development in the Northern Great Plains fall largely into this same category. The majority notes that the court in *Armstrong* refused to wait for the study because no comprehensive study had been commenced, and therefore finds the case to be in sharp contrast to the instant case where the NGPRP Study is under way. It is revealing, however, that the majority does *not* find this fact to be of significance in its discussion of *Jicarilla* where the Southwest Energy Study had been released by the time the case was decided.

The remaining cases cited on slip op. at 763, 764, *supra*, — U.S.App.D.C. at —, — F.2d at —, involved demands that a comprehensive EIS be prepared prior to the approval of individual projects and thus are squarely on point with the instant case. In *Sierra Club v. Callaway*, *supra*, the Fifth Circuit reversed a District Court decision which had ordered that construction of the Wallisville Reservoir project be held up pending the preparation of an EIS covering the entire Trinity Basin project. The court held:

We conclude that the Wallisville and Trinity River Projects are not interdependent. The nexus between the projects is not such as to require an EIS evaluation of the Trinity Project as a condition precedent to an EIS evaluation of Wallisville. The Wallisville EIS should speak for itself. Wallisville is a separate viable entity. It should be examined on its own

merits. Although it has been made compatible in certain of its features with Trinity it is not a mere component, increment, or first segment of Trinity. The court erred in so holding.

499 F. 2d at 990. Faced with a similar situation, the Tenth Circuit reached the same conclusion in *Sierra Club v. Stamm*, *supra*. There the plaintiffs attacked the final EIS for the Strawberry Aqueduct and Collection System, a subunit of the larger Bonneville Unit which was in turn a part of the Central Utah Project, because *inter alia*:

(1) The Statement is too narrow in its scope and should include the cumulative and collective environmental impact of the entire Central Utah Project; (2) the Statement is incomplete in that it is a *final* statement as to the Strawberry Collection System only, and that it should, but does not, encompass all increments of the Bonneville Unit;

507 F. 2d at 790. Relying on *Callaway* and *Armstrong*, the court concluded:

In sum, then, we agree with the trial court that the Strawberry system in and of itself constitutes a "major Federal action" and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system before work may be commenced on the Currant Creek Dam.

507 F. 2d at 792-93. Thus both the Tenth and Fifth Circuits decided cases against the Sierra Club on the same grounds that they assert here.

In its most recent decision on this subject, the Ninth Circuit once again rejected claims that an EIS of larger scope was required by NEPA. The Teton Dam and Reservoir project had been divided into two

phases. In *Trout Unlimited v. Morton*, *supra*, the plaintiffs argued that the EIS prepared for the initial phase was fatally inadequate because it did not discuss the environmental impact of the Second Phase. After considering the cases relied upon by the majority here,¹³ the court concluded:

The distinction between those situations in which it has been held that the EIS must cover subsequent phases and that before us is that here the First Phase is substantially independent of the Second while in those in which the EIS must extend beyond the current project, that project was dependent on subsequent phases. The dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken. This is not the case here.

509 F. 2d at 1285 (footnote omitted).

The majority attempts to evade the fact that its decision is contrary to the clear weight of authority elsewhere in the federal courts of the nation by arguing that each of the foregoing decisions involved a "crucial dependence upon the facts."¹⁴ Obviously all judicial decisions turn on the facts which are presented to the court, but the majority has failed to offer any convincing explanation as to why the facts of the instant case, which present the same situations as the facts in the cases cited above, require a different result.

The regional water projects involved in *Callaway*, *Stamm* and *Trout Unlimited* had certainly progressed

¹³ The court discussed *SIPI* and *Thompson v. Fugate*, 347 F. Supp. 120 (D. Conn. 1972) and *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167 (S.D. Iowa 1972), modified, 484 F. 2d 11 (8th Cir. 1973). The latter two cases involved attacks on impact statements covering segments of highway and thus presented issues similar to *Conservation Society*.

¹⁴ Majority Op. at n. 29.

to the point where the federal agencies involved had concrete notions as to the ultimate scope of regional development, yet the court in each case found it unnecessary to prepare a regional EIS before acting on the initial phases of the development. In contrast, even if we ignore the statements by the federal appellees that there is at present no overall coordinated program for the development of coal resources in the Northern Great Plains, appellants have failed to establish that planning has progressed to the point where some proposal for major *regional* federal action exists which could be the subject of a regional EIS.

Furthermore, although there are undoubtedly some interrelationships between development projects along the course of a single river or in a single watershed basin, the Fifth, Ninth and Tenth Circuits were still able to find the projects sufficiently independent to render a more comprehensive EIS unnecessary. The potential development of the Northern Great Plains lacks even this slight relationship between projects. Appellants, at a time of great need for new energy sources, are seeking to halt development of three grades of coal deposits distributed through four states and involving nine federal agencies and at least fifteen different forms of "federal action." Clearly the developments projected for this Region by appellants themselves do not have even the minimal interrelationships one might have expected to find in *Callaway, Stamm* or *Trout Unlimited*.

V

The majority is to be credited for perceiving the "practical difficulties" inherent in appellants' contention that NEPA allows the courts to impose upon the

Government the duty to plan comprehensively.¹⁵ Truly, such an interpretation could result in the generation of an infinite progression of comprehensive plans which would have to be justified by comprehensive impact statements. It seems obvious that NEPA was enacted as a means of facilitating agency decision making and not as a means of paralyzing the federal government. However, I am concerned that rather than nipping such fallacious notions in the bud, the majority attempts to demonstrate that appellants' arguments have a legal basis.¹⁶ Although its dicta is constructed on prior dicta and on CEQ Guidelines of questionable force as legal authority, it has laid the groundwork for the perpetuation of this erroneous and impractical position in future cases.

From its review of the record, the majority finds "overwhelming" evidence that "the federal appellees have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains."¹⁷ However, the most remarkable thing about the first two such "endeavors" was the fact that they collapsed without producing any plan for regional development. The only currently pending activity which could lead to the "regional plan" anticipated by the majority is the Northern Great Plains Resources Program Study, but there is no assurance at present that it will be any more successful than the earlier studies. Furthermore, the Study was *never intended* to produce a comprehensive

¹⁵ Majority Op. at 746-747, — U.S. App. D.C. at —, — F. 2d at —.

¹⁶ *Id.* at 745-747, — U.S. App. D.C. at —, — F. 2d at —.

¹⁷ *Id.* at 748, — U.S. App. D.C. at —, — F. 2d at —.

regional plan for coal development. The Draft Interim Report states:

The primary objective of the Northern Great Plains Resource Program is to provide information and a comprehensive analysis that can be used to place the potential impacts of coal development into perspective and thereby assist the people of the Northern Great plains and the Nation in the management of the natural and human resources of this region.

* * * *

The three coal development profiles do not represent plans for development, but are instead tools designed to help measure what the effects may be at different rates of development.

Northern Great Plains Resource Program, Draft Report, Sept. 1974, I-4, 5 (emphasis in original). Not only is the Study insufficient to be viewed as a regional EIS, as the majority correctly notes,¹⁸ its issuance will probably add little to this court's ability to determine the need for a regional EIS if on remand the federal appellees adhere to their position that they have not yet adopted or proposed a regional development program.

Since review of the record and consideration of those cases which have dealt with claims for the preparation of more "comprehensive" impact statements lead me to agree with the District Court¹⁹ that NEPA does not require the preparation of an EIS covering all coal-related development in the entire Northern Great Plains at this time, there is no need to remand this case for further proceedings. Nor is there any justification in further delaying projects which are already supported by impact statements through continuation of this court's temporary injunction.

¹⁸ *Id.* at 749-750, — U.S. App. D.C. at —, — F. 2d at —.

¹⁹ See Conclusions of Law, ¶ 6, App. 247.

If appellants believe at some point that an EIS issued in support of federal action on a particular project fails to adequately consider all reasonably related environmental impacts, they can challenge that project under the normal procedure for judicial review of impact statements. Furthermore, in the event the various agencies take concrete steps toward the establishment of a federally coordinated program of regional development, appellants will of course be able to bring their suit if the agencies take a "major federal action" to implement that program without the preparation of the necessary impact statements.²⁰

While the majority's attempt to force the federal government to engage in comprehensive long-range planning might in some sense be socially "good," the question before this court is not what the agencies "ought to" do but rather what NEPA requires that they do. To my mind it clearly does not require or authorize the continuance of the temporary injunction to hold federal agencies in check because the majority are suspicious of what the federal agencies might do. I accordingly respectfully dissent.

²⁰ The majority's suggestion that the agencies might be required to prepare an impact statement or a statement of reasons to justify why they are *not* taking major federal action to control development of the Northern Great Plains (Majority Op. at 755, — U.S. App. D.C. at —, — F. 2d at — and n. 37) is clearly not consistent with the provisions of NEPA. Despite the current size of the federal bureaucracy, the realm of things the federal government does *not* do is still rather large. A good many of these inactions undoubtedly have an impact on the environment, but it is difficult to see how any agency would be able to produce this nearly infinite number of "negative" impact statements and still carry out its assigned functions. In any event, NEPA clearly limits the requirement for preparation of impact statements to "proposals for . . . major federal actions."

APPENDIX B

SIERRA CLUB ET AL., APPELLANTS,

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED
STATES DEPARTMENT OF THE INTERIOR, ET AL.

(No. 74-1389)

United States Court of Appeals, District of Columbia
Circuit.

(Argued Dec. 17, 1974; Decided Jan. 3, 1975)

Before BAZELON, Chief Judge, and WRIGHT
and MacKINNON, Circuit Judges.

ORDER

PER CURIAM.

On consideration of appellants' motion for a limited injunction pending appeal, and it appearing from the Secretary's answer to Plaintiffs' Revised Supplemental Interrogatory No. 31 that the Secretary is in the process of approving or disapproving the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement and that such an injunction is required to maintain the status quo pending disposition of this appeal, it is

Ordered by this court that the aforesaid motion is granted, and it is

(75A)

Further ordered by this court that the Secretary of the Interior take no action concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement pending further order of this court.

MACKINNON, Circuit Judge (dissenting):

In the foregoing order the majority grant appellants' motion for a limited injunction pending appeal and order the Secretary of the Interior to refrain from any action concerning the projects covered by the Eastern Powder River Coal Basin Environmental Impact Statement until further order by this court.

Although the Powder River Statement is attached to the record as an exhibit, the court below was not called upon to rule as to the adequacy of the statement to support the particular federal actions it covers, and therefore that issue is not before this court on appeal. If appellants believe that that particular statement is not sufficient to justify approval of the mining plans and rights-of-way, the proper method for the expression of such concerns is to file an appeal challenging that statement. All of appellants' arguments relating to the necessary scope of impact statements on projects within the region can be raised in a challenge to a particular statement. The appeal presently before this court is not an appropriate vehicle for obtaining *de facto* review in this circuit of the sufficiency of impact statements covering various federal projects within appellants' "Northern Great Plains Region." It obviously is less convenient for appellants to be required to litigate each statement, but the law was not written for the convenience of the Sierra Club and other litigants.

The Powder River Statement is only one of three statements which have been issued on projects within

the region. See Supplemental Finding on Remand No. 9a. The adequacy of the statement relating to the Westmoreland mine has been litigated following approval of that application. The Montana District Court held in *Redding v. Morton*, Civ. No. 74-12-BLG (D.Mont. May 1, 1974) that that statement complies with the requirements of NEPA, and that case is on appeal to the Ninth Circuit. This court obviously cannot enjoin the Ninth Circuit from upholding the Montana District Court and thus allowing the development to proceed. Nor could it enjoin the parties from proceeding with a project approved by another court. The Peabody Coal Company project has also been approved but apparently it has not yet been challenged in court (Supp. Memo of Intervening Defendants-Appellees at 12). If an action is initiated to review the adequacy of the statement covering that project, this court could not prevent another court from entertaining that action. The effect of the proposed injunction, then, is to remove one of the three impact statements from the normal process of judicial review of the adequacy of such statements.

In *Scientists Institute for Public Information, Inc. (SIPI) v. AEC*, 156 U.S. App. D.C. 395, 411 n.68, 481 F.2d 1079, 1095 n.68 (1973), this court stated:

The decision whether the time is ripe for a NEPA statement on an overall research and development program is a mixed question of law and fact. * * *

With respect to judicial review of such mixed questions of law and fact, the Supreme Court has authorized a practical standard of review, the "rational basis" test, under which the court will reverse the agency's decision if it has no warrant in the record and no reasonable basis in law.

The agency decision in the instant case is that no federal program currently exists which requires the preparation of a comprehensive impact statement covering appellants' "Northern Great Plains Region." An agency decision as to the scope of an impact statement should receive at least as much deference as a decision on the timing of the preparation of a statement. Thus the Department of the Interior's decision not to issue a regional statement should also be upheld if it has a rational basis.

Rather than proceeding on a regional basis, the Secretary has decided to prepare a national policy governing coal leasing activities. The Government's position has consistently been that an impact statement must be prepared before any major federal action relating to coal development will be taken within the "region" or elsewhere. See Supp. Finding on Remand No. 6. Any statement will cover cumulative as well as incremental impacts. Where it finds that a statement covering related actions within an area is appropriate, a broader statement will be issued. The preface of the Powder River Statement, quoted in Supp. Finding on Remand No. 8, illustrates the considerations which determine the appropriate scope of such a statement. The Secretary has also initiated the Northern Great Plains Resources Program Study which by chance covers roughly the same area as the vague "region" described in appellants' complaint. However, this Study is merely intended to provide a framework for future decision-making and is not designed to produce an impact statement for particular federal actions. The court may feel that it would be beneficial for the Government to engage in the type of comprehensive long-range regional planning which appellants advocate, but it cannot be logically argued that the Gov-

ernment's approach to the problem is without a rational basis.

The instant case is distinguishable from *SIPI* which required the preparation of a comprehensive impact statement covering a research and development program for liquid metal fast breeder reactors. *SIPI* dealt with one program of research into a particular type of reactor being conducted by a single federal agency and funded by a separate annual appropriation. It was reasonable to view this program as a "major federal action" for which an overall impact statement would be appropriate. In contrast, appellants in the instant case seek to bring to a halt any federal action which may be related to the development of deposits of three grades of coal distributed through four states. Nine federal agencies and at least 15 types of federal action are involved. The record discloses no action directed to appellants' entire "region" except the Study. It is certainly not necessary for the Government to prepare an impact statement prior to studying a problem.

SIPI involved an irretrievable commitment of resources since each expenditure on the development of a particular style of breeder reactor made it more difficult to abandon the investment in favor of an alternate design. No such commitment of resources exists in the instant case. The fact that one mining operation is approved does not compel or impel the approval of other mining proposals elsewhere in the region. While some projects will undoubtedly be inter-related (*e.g.* a mine and associated rail rights-of-way), the impact statements on such projects will be coordinated and must consider cumulative effects. In general the development of any portion of the region can proceed independently of prior development elsewhere.

Absent proof of the existence of an explicit or implicit federal program covering the entire region and absent an irretrievable commitment of *regional* resources from the approval of *individual* federal actions, it cannot be said that the Government has abused its discretion by declining to prepare a regional impact statement. Thus the facts in *SIPI* are distinguishable from the situation here presented and that decision does not require that appellants' contentions be upheld by this court.

The Fifth, Ninth and Tenth Circuits have recently upheld impact statements covering individual projects which were alleged to be part of larger regional developments. *Sierra Club v. Stamm*, 507 F. 2d 788 (10th Cir. Nov. 29, 1974);¹ *Sierra Club v. Callaway*, 499 F. 2d 982 (5th Cir. 1974);² *Environmental Defense Fund v. Armstrong*, 487 F. 2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974, 94 S. Ct. 2002, 40 L. Ed. 2d 564 (1974).³ The projects dealt with in those cases were more closely related and were confined to smaller geographic areas than are the proposed federal actions attacked by appellants in the instant case, and yet the circuit courts in each of those cases found that an impact statement for the affected region was not required.

For the foregoing reasons I respectfully dissent from the issuance of the subject injunction.

¹ This involved the relation of the Strawberry Aqueduct & Collection System to the larger Bonneville Unit and Central Utah Projects.

² This involved the relation of the Wallisville Reservoir Project to the larger Trinity River Project.

³ This involved the relation of the New Melones Dam to the larger Central Valley (California) Project.

APPENDIX C

United States Court of Appeals for the District of
Columbia Circuit

[Civil Action 1182-73, Filed, October 14, 1974;
Hugh E. Kline, Clerk]
(No. 74-1389)

SIERRA CLUB, ET AL., APPELLANTS

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED
STATES DEPARTMENT OF INTERIOR, ET AL.

Before: Circuit Judge LEVENTHAL and Judge
NICHOLS, Court of Claims.

ORDER

It is hereby ordered, *sua sponte*, that argument be rescheduled for December 17, 1974.

In the interim, the record is remanded to the District Court for a further evidentiary hearing. The court would like to have the benefit of the district judge's findings on the following matters:

1. Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been issued for lands in the Northern Great Plains region since February 17, 1973?

2. Is the suspension of the issuance by the United States of coal prospecting permits announced on Feb-

ruary 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

3. To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973?

4. Have any applications for permits for rights-of-way over lands within national forests in the Northern Great Plains region been considered or acted upon by the Department of Agriculture since June 30, 1974? Have any applications for permits for rights-of-way over navigable rivers in the Northern Great Plains region been considered or acted upon by the Corps of Engineers since June 30, 1974?

5. Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

6. Does the United States Government contemplate the preparation of any future environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

7. What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

8. How was the area to be covered by the EIS for the development of coal resources in the Eastern Powder River Coal Basin defined, and how was it determined that an EIS was appropriate for that area?

9. Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after Febru-

ary 17, 1973, or prepared for projects that were commenced after that time—

a. Provide one or more representative statements.

b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area?

c. Do the statements take into account the ecological setting created by private action in the area?

d. Has the government devised any procedure for cross-referencing among the individual statements?

The December argument date allows the case to be argued several months earlier than if it had not been expedited, while permitting the court to obtain the benefit of the supplemental record and findings, which the court believes will facilitate its consideration of the issues. The court requests the District Court, which has latitude to revise its earlier findings and conclusions, to file the supplemental record, and findings on or before November 25, 1974.

Counsel for all parties—appellants and appellees may file supplemental memoranda, on or before December 9, 1974, concerning the significance of the supplemental record and findings, and the consequence in terms of the appropriate disposition by the Court of Appeals.

Per Curiam

For the Court:

HUGH E. KLINE,
Clerk.

APPENDIX D

United States District Court for the District of
Columbia

[Filed February 14, 1974, James F. Davey, Clerk]

(Civil Action No. 1182-73)

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

and

PEABODY COAL CO., ET AL., INTERVENOR DEFENDANTS

MEMORANDUM OPINION

In this suit several environmental and public interest organizations sue the Secretaries of the Department of Interior, Department of Agriculture, Department of the Army and other Federal government officials claiming that they have violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA). Plaintiffs seek a declaratory judgment, injunctive relief and mandamus and allege that the defendants in violation of NEPA mandates have permitted and authorized development of coal reserves in the Northern Great Plains region without first preparing a comprehensive environmental-impact statement, systematic interdisciplinary studies of coal-development and a study of appropriate alternative courses of action. Several coal mining companies, elec-

tric power and utility companies and the Crow Tribe of Indians were allowed to intervene.

The matter came on for hearing upon plaintiffs' motion for summary judgment, the cross motions for summary judgment of the Federal defendants and of the intervening defendants, the motion for judgment on the pleadings of the intervening defendants, and the motions for partial summary judgment of intervening defendants Atlantic Richfield Company, Kerr-McGee Corporation, and Westmoreland Resources. Upon consideration of these motions, the affidavits, exhibits, answers to interrogatories and memoranda filed by the parties, and the oral arguments of counsel, the Court hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs are the Sierra Club, a nonprofit California corporation; the National Wildlife Federation, a nonprofit District of Columbia corporation; the Northern Plains Resource Council, a nonprofit unincorporated organization with members in Montana; the Montana League of Conservation Voters, an unincorporated organization with members in Montana; and the League of Women Voters of South Dakota, an unincorporated organization with principal offices in Rapid City, South Dakota. Many members of plaintiff organizations live, work, engage in recreational activities, own land and hold surface rights on or immediately adjacent to the sites of coal mining and related activities in the four-state area, Montana, Wyoming, North Dakota and South Dakota. These plaintiffs sue as organizations and on behalf of their members.

2. The defendants named in the complaint are Rogers C. B. Morton, the Secretary of the Interior;

Marvin Franklin, Assistant Secretary for Indian Affairs of the Department of the Interior; Gilbert G. Stamm, Commissioner of the Bureau of Reclamation of the Department of the Interior; Vincent E. McKelvey, Director of the United States Geological Survey of the Department of the Interior; Earl L. Butz, the Secretary of Agriculture; John R. McGuire, Chief of the Forest Service of the Department of Agriculture; Howard H. Callaway, the Secretary of the Army; and F. J. Clarke, Chief of Engineers, United States Army Corps of Engineers. Burton W. Silcock was also named as a defendant as Director of the Bureau of Land Management of the Department of the Interior but the United States has alleged that Curt Burkland is the Director of the Bureau of Land Management.

3. The following parties were allowed to intervene as defendants: Atlantic Richfield Company; Cities Service Gas Company; Westmoreland Resources; Peabody Coal Company; Kerr-McGee Corporation; American Electric Power System; Panhandle Eastern Pipe Line Company; Arkansas Power & Light Company; Oklahoma Gas & Electric Company; Northern Natural Gas Company; Wisconsin Power & Light Company; Patrick J. McDonough; The Crow Tribe of Indians; Montana Power Company; Puget Sound Power & Light Company; Portland General Electric Company; and the Washington Water Power Company.

4. By this suit plaintiffs seek a declaration that NEPA requires

the preparation and consideration of a comprehensive environmental-impact statement concerning coal development in the Northern Great Plains region before issuing coal prospecting permits or mining leases, entering into options or contracts for the sale of water or taking any

other actions concerning coal development in the Northern Great Plains Region. * * *;

and that NEPA also requires

the carrying out of systematic interdisciplinary studies of the coal development in the Northern Great Plains region and the study of appropriate alternatives to this development.

5. Plaintiffs also seek an injunction against any actions by the Federal Government affecting coal development in the Northern Great Plains region pending the completion of an Environmental Impact Statement for that region and related studies under NEPA Sections 102(2) (A), (C), and (D).

6. The complaint asserts that the "Northern Great Plains region involved in this lawsuit includes northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota."

7. The "Northern Great Plains region" as described by the plaintiffs is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action.

8. There is no existing or proposed Federal regional program, plan, project, or other regional "federal action" *within the meaning of NEPA Section 102(2)* for the development of coal or other resources in the area defined by the plaintiffs as the "Northern Great Plains region."

9. Pursuant to the authority of the Mineral Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. 181 *et seq.* as amended, the Department of the Interior, beginning in 1920 issued coal mining leases on Federal lands in Montana covering 33,000 acres. Of those leases, five are presently producing, including the lease issued in 1923.

Beginning in 1922, that Department commenced issuing coal leases covering 16,000 acres of land in North Dakota. Six of those leases, including the lease issued in 1922, are still producing.

Commencing in 1922, the Department of the Interior has issued coal leases covering 118,000 acres of Federal lands in northern Wyoming. Of those leases, only four are presently producing, including the lease issued in 1922.

10. Coal prospecting permits have also been issued for several thousand acres of Federal-owned lands in Montana and Wyoming and in addition, several thousand acres of land in the Crow, Cheyenne, Ft. Berthold, and Wind River Indian Reservations have been leased by the Tribes with the approval of the Bureau of Indian Affairs.

11. At the present time, coal is being produced from only *four* leases in Montana, *six* leases in North Dakota, and *four* leases in northern Wyoming. All producing coal mines are operating under approved mining plans and under state-approved reclamation plans.

12. On May 26, 1970, the Department of the Interior initiated the North Central Power Study. The purpose of that study was to investigate the potential for coordinated development of electric power supply in the north central United States. The Department of the Interior was aware that private companies have had plans or are developing plans for utilization of coal in the Northern Great Plains and many such development plans involve state or privately owned lands—not lands of the United States.

13. The Phase I report of that Study, which was a broad reconnaissance type study, was issued in October 1971 and utilities were given until July 1, 1972, to

comment on the report. The responses received did not indicate that a plan for the coordinated development could be formulated and the study was terminated at the end of Phase I.

14. The Department of the Interior has taken action to control development of coal on a national basis, including the Northern Great Plains. It has initiated a study of potential water resource projects in southeastern Montana and northeastern Wyoming (*the Montana-Wyoming Aqueducts Study*). It has established a new national coal leasing policy and has halted the issuance of prospecting permits. It has also established a policy with respect to coal leasing of Indian lands and has instituted the Northern Great Plains Resources Program (NGPRP). Those actions, however, are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures of the National Environmental Policy Act of 1969.

15. The new national coal leasing policy was announced by the Secretary of Interior on February 17, 1973. This policy has both short-term and long-term aspects. One aspect of the policy is the preparation of an Environmental Impact Statement on the proposed Federal coal leasing in the United States. This statement is referred to as the coal programmatic EIS. The primary objective of the statement is to provide a national overview of the impact of the entire Federal coal leasing program on the quality of the human environment.

16. That statement will not deal with proposed developments of individual companies. It will serve as the foundation and framework for subsequent environmental analyses and supplemental statements which

may be prepared for subregions, geological structures or basins, or on an individual basis for coal management actions. Also, the coal programmatic EIS is essential to the development of a planning system to determine the size, timing, and location of future coal leases in order to meet energy needs most effectively.

17. A working draft of the statement has been prepared and is currently undergoing internal review. When it is completed, it will be issued in draft form for general agency and public comment. This will allow public involvement in the analysis and review of the Federal leasing policies and procedures which have an impact upon the environment. It is planned that the final coal programmatic EIS will be issued in early 1974 following consideration of comments and necessary review.

18. Prior to the issuance of the coal programmatic EIS in its final form and the development of the planning system, coal leases will not be issued except pursuant to the short-term coal leasing policy which was announced in the news release of February 17, 1973. That policy dictates that coal leases will be issued only under the following conditions:

- a. When coal is needed now to maintain existing mining operations; or
- b. When coal is needed as a reserve for production in the near future; and
- c. When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and
- d. When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act.

19. The short-term leasing policy will restrain leasing in the Northern Great Plains region except under

the conditions set forth in paragraph 18 and will limit the Department's actions to those for which it has adequate information basis. It is intended to insure that current coal production can continue and to prevent deficiencies in supplies of coal which are necessary to meet continuing energy needs.

20. The information compiled and developed will expand the Department's informational basis upon which decision will be made. The coal programmatic EIS in its present form contains material relative to the Northern Great Plains. The section on the various environments where coal occurs includes an extensive part on the Northern Great Plains region with discussions relating to geology, topography, climate, hydrology, soils, vegetation, wildlife, land use, population patterns, and human value resources in the province. In addition, the section on impacts on the environment from coal leasing contains a part on the impacts unique to the Northern Great Plains region. Other material analyzed and developed in the coal programmatic EIS will be valuable in decision-making relative to the Northern Great Plains, such as discussions relating to measures to mitigate environmental impacts, alternative sources of energy, and conservation of energy use.

21. The issuance of coal prospecting permits by the Department of the Interior was halted by Secretarial Order No. 2952 issued February 13, 1973. No prospecting permits will be issued until further notice. The purpose of that order was to allow for the more orderly development of coal resources upon the public lands with proper regard for the protection of the environment in a manner consistent with the National Environmental Policy Act of 1969.

22. In fulfilling its fiduciary responsibilities, the policy of the Department with respect to approval of coal leasing on Indian lands is that approval will be granted where the tribal or individual Indian landowner desires to dispose of the minerals, where the terms and conditions of the lease are in the best interest of the Indian landowners, where appropriate environmental safeguards are imposed on the lessee and where the requirements of National Environmental Policy Act have been satisfied.

23. The NGPRP study was initiated by the Secretary of Interior in an interdepartmental memorandum of June 30, 1972 and later announced in a press release of October 3, 1972. The study is to provide a tool for planning at all levels of government rather than to develop an actual plan. The study is being conducted by an interagency, Federal-State Task Force with public participation. Its analyses are to be based on assumptions of various possible levels of resource development in order to provide an informational framework for informed decision-making and planning. The study will consist of a series of investigations and studies conducted by work groups in seven principal areas of concern: regional geology; mineral resources; water (supply and quality); air quality; surface resources; social, economic, and cultural aspects; and national energy consideration. The results of these investigations will be integrated into the development of scenarios for predicting the environmental and social consequences of various possible developments.

24. The NGPRP is financed and staffed and the study is underway. The work groups are in the field, public meetings have been held in the Northern Great Plains areas. The work groups are to complete their

preliminary reports in the spring of 1974 and an overall interim report is to be prepared by June 1974. After review of the report, decisions will be made concerning the necessity of further study in specific areas.

25. The purpose of the Department of Interior policy with respect to resource development in the Northern Great Plains areas is to insure that development does not proceed based solely on single purpose studies incapable of developing comprehensive information or by piecemeal actions which restrict future options. To fulfill that purpose the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains areas will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary of Interior for review and concurrence prior to execution.

26. With respect to the Montana-Wyoming Aqueducts Study, the decision was made in the fall of 1972, not to seek funding for fiscal 1974 and no funding will be sought for fiscal 1975. That study and other proposals such as the Morehead Dam will be held on abeyance pending the results of the NGPRP study.

27. After completion of the coal programmatic EIS in early 1974, decisions will be made concerning supplemental statements necessary for coal management actions. It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available may indicate that statements on smaller subregions, geologic structures, basin, or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satis-

factory manner. Until those decisions are reached, no new coal leases will be issued except pursuant to the short-term leasing policy. The interim report from the NGPRP will be available in the summer of 1974 and will provide an informational foundation for decision-making and planning. This information will be utilized in decision-making for all coal related actions in the Northern Great Plains areas and will form a useful reference source for preparing environmental analyses and statements on proposed actions or groups of actions in the Northern Great Plains area. Until the interim report is available, decisions relating to coal development in the Northern Great Plains will be held in abeyance or submitted to the Under Secretary for review and concurrence.

28. Neither the Department of Agriculture which has jurisdiction over issuance of permits for rights-of-way over lands within national forests nor the Corps of Engineers which has jurisdiction over navigable rivers has pending before either any applications for any permits or rights-of-way within their authority to grant. Nor does either agency intend to consider such applications prior to June 30, 1974.

29. There is no existing or planned Federal program or action in the area defined by the plaintiffs as the "Northern Great Plains region" to which appropriations of funds have been allocated for implementation of proposals, or for which there is a schedule for the implementation of proposals, or as to which the Federal Government has made commitments to take further steps to carry out proposals.

30. There is no evidence of record in this case that in the area defined by the plaintiffs as the "Northern Great Plains region" that Federal action has been taken or is threatened to be taken on individual proj-

ects for the development of coal or other resources without compliance with the requirements imposed by NEPA and by applicable state laws relating to environmental consideration.

31. There is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by the plaintiffs as the "Northern Great Plains region" are being planned or constructed as part of any integrated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in such area.

32. There is no evidence in the record of this case that irreparable harm would result to plaintiffs if an injunction were not granted as prayed or that the balance of equities favors the granting of such an injunction.

33. The record in this case establishes that large sums have been invested in good faith by the intervening defendants and others in connection with and in reliance upon individual existing and proposed projects in the "Northern Great Plains region" referred to in the complaint for the development of coal and other resources and for the use of such coal for the generation of electricity and production of synthetic natural gas; and that if an injunction as requested by the plaintiffs were to issue, irreparable harm would result to the intervening defendants, who have submitted affidavits describing their commitments and potential losses, and to the public at large.

CONCLUSIONS OF LAW

1. The jurisdiction of the Court over the subject matter of this action is founded upon 28 U.S.C. § 1331(a).

2. Rule 56(c) of the Federal Rules of Civil Procedure requires that in order for a summary judgment to be entered in this case on the motion of any party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787-788 (D.C.Cir. 1971); Fed. R. Civ. P. 56(c).

3. Section 102(2) of NEPA, 42 U.S.C. § 4332(2), requires "all agencies of the Federal Government" to

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources * * *.

4. NEPA Section 102(2)(C) requires an environmental impact statement before "major Federal actions" are taken with respect to an individual Federal project. Multiple applications for Federal action in connection with individual private projects which are unrelated to each other, except that they involve resource development at some point within a multistate area, do not constitute a private or Federal regional plan or program for development, nor do they require the Federal Government to develop a regional plan or program for development with respect to such multiple applications. Questions relating to the scope of an environmental impact statement prepared for each individual application are to be decided initially by the Federal agency or agencies involved at the time action is taken upon such application. *Scientists' Institute for Pub. Info. v. AEC*, 481 F.2d 1079, 1091 (D.C. Cir. 1973); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F. 2d 1275 (9th Cir. 1973); *Natural Resources Defense Council v. Morton*, 458 F. 2d 827, 836 (D.C. Cir. 1972).

5. The requirement in NEPA Section 102(2)(A) that Federal agencies utilize a "systematic, interdisciplinary approach . . . in planning and decision making which may have an impact on man's environment" by its own terms does not require that such an approach be on a region-wide basis where, as in this case, the "planning and decisionmaking" is not on a region-wide basis. Similarly, the requirement in NEPA Section 102(2)(D) that Federal agencies

"study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources" by its own terms does not necessitate that the "appropriate alternatives" to be studied, developed, and described be on a region-wide basis where, as in this case, the "recommended course of action" is not on a region-wide basis. See *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1403 (D.D.C. 1971). Federal approval of individual projects or applications, including preparation of environmental impact statements relating thereto, need not await completion of "regional" studies not oriented to the particular project or application. *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280-1281 (9th Cir. 1973).

6. Since there is no existing or proposed regional program or project or other regional "federal action" within the meaning of NEPA Section 102(2) for the development of coal or other resources in the "Northern Great Plains region", the complaint does not set forth a claim upon which relief can be granted.

7. Questions relating to the scope and validity of studies and environmental impact statements in connection with proposed Federal actions under NEPA Sections 102(2)(A), (C) and (D) are to be decided by the Federal agency responsible for the proposed action with respect to an individual project, and the courts will not review the validity of supporting statements or studies until final Federal actions taken under NEPA Section 102(2) and until after final agency action has been taken with respect to the individual project. *Scientists Institute for Pub. Info. v. AEC*, 481 F.2d 1079, 1091 (D.C. Cir. 1973); *Natural Resources Defense Council v. Morton*, 458 F. 2d 827, 836

(D.C. Cir. 1972); *Coalition for Safe Nuclear Power v. AEC*, 463 F. 2d 954, 955 (D.C. Cir. 1972); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970); *Gage v. Commonwealth Edison Co.*, 356 F. Supp. 80, 86 (N.D. Ill. 1972); *Sherry v. Algonquin Gas*, 4 ERC 1713, 1714 (D. Mass. 1972).

8. For the reasons set forth in Conclusion of Law No. 7 the complaint does not present a justiciable case or controversy with respect to proposed or future Federal action. *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 434 (1948); *Ashwander v. TVA*, 297 U.S. 288, 324 (1936); *Committee to Stop Route 7 v. Volpe*, 4 ERC 1681, 1683, 1684 (D. Conn. 1972).

9. The Northern Great Plains Resource Program now being conducted under the auspices of the Department of the Interior is a study project and not a program for development, and it does not constitute "major Federal action" within the meaning of NEPA Section 102(2)(C). There has been no showing in this case that the Northern Great Plains Resources Program "has life" as a federal regional program for development of coal and other resources or is accompanied by either a schedule for implementation of concrete proposals, commitments that steps toward implementation will be taken, or specific annual appropriations for its work. *Scientists' Institute for Pub. Info v. AEC*, 481 F. 2d 1079, 1082-1084, 1087, 1095-1098 (D.C. Cir. 1973).

10. Even if there were some regional Federal program for the development of coal and other resources in the "Northern Great Plains region", NEPA would not prohibit Federal action upon an individual project within the "region" on the basis of an environmental impact statement prepared for that project prior to completion of the regional program. *Jicarilla Apache*

Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); *Indian Lookout Alliance v. Volpe*, 5 ERC 1749, 1754 (8th Cir. 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973); *Movement Against Destruction v. Volpe*, 5 ERC 1625 (D. Md. 1973).

11. Even if the complaint stated a claim upon which relief could be granted, plaintiffs would not be entitled to an injunction against any actions by the Federal Government affecting coal development in the Northern Great Plains region because there has been no showing in this case that irreparable harm would result in the absence of such an injunction or that the balance of equities favors the granting of such an injunction; and because the record discloses that such an injunction would cause irreparable injury to the defendants and to the public at large. *Aberdeen & Rockfish R.R. v. SCRAP*, 409 U.S. 1207, 1218 (1972); *Environmental Defense Fund, Inc. v. Froehlke*, 477 F. 2d 1033, 1036, 1037 (8th Cir. 1973); *Sierra Club v. Hickel*, 433 F. 2d 23, 33 (9th Cir. 1970).

12. On the basis of the foregoing findings of fact and conclusions of law, the motion for summary judgment filed by the Federal defendants and the motions for summary judgment and for judgment on the pleadings filed by the intervening defendants should be granted; and the motion for summary judgment filed by the plaintiffs should be denied.

BARRINGTON D. PARKER,
United States District Judge.

FEBRUARY 14, 1974.

APPENDIX E

United States District Court for the District of
Columbia

[C.A. No. 1182-73, Filed November 25, 1974;
James F. Davey, Clerk]
SIERRA CLUB ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON ET AL., DEFENDANTS

RESPONSE TO REMAND

On October 14, 1974, the United States Court of Appeals for the District of Columbia Circuit remanded this matter to the District Court for a further evidentiary hearing. Specifically, the Court of Appeals requested findings on certain matters embraced in nine questions. Pursuant to the remand a hearing was held and a schedule was developed for submissions by the parties. Affidavits from officials of the Departments of Interior, Agriculture and Army were submitted, with proposed findings. The plaintiffs were allowed to conduct discovery by way of written interrogatories, and by taking the deposition of William W. Lyons, Deputy Undersecretary of the Interior. This deposition was supplemented by Mr. Lyons' in-court testimony. Proposed findings were submitted by the plaintiff.

The Court has considered the responses and objections of both sides and enters its *Supplemental Findings on Remand*.

Entered: November 25, 1974.

BARRINGTON D. PARKER,
United States District Judge.

(103A)

SUPPLEMENTAL FINDINGS PURSUANT TO REMAND

INQUIRY NO. 1

Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been issued for lands in the Northern Great Plains region since February 17, 1973?

Finding

The limitation on the issuance by the United States of coal leases announced on February 17, 1973 (the short-term coal leasing policy announced by Interior Secretary Morton in the news release of February 17, 1973 and set forth in Item 8 of Secretary Morton's affidavit of October 26, 1973) is still in effect. The Interior Department has not, since February 17, 1973, issued any coal lease in the Northern Great Plains region, which was defined in plaintiffs' original complaint as including northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota.¹ Pursuant to the national limitation on coal leases,² however, four leases covering a total of 4,018.95 acres have been issued since February 17, 1973, in parts of the United States outside of the Northern Great Plains Region:³

¹ See *Sierra Club v. Morton*, C.A. 1182-73 (February 14, 1974) at 4 (Findings of Fact, No's 6 and 7).

² *Id.* at 6-7 (Finding of Fact, No. 15).

³ Answers of Defendant, Rogers C. B. Morton, Secretary of the Interior, to Plaintiffs' Revised Supplemental Interrogatories to Federal Defendants, filed November 11, 1974, at 1.

Lease	State	Date	Acreage
ES-9403.....	Pennsylvania.....	July 1, 1974	29.661
ES-12284.....	Alabama.....	June 1, 1974	2388.24
U-13097.....	Utah.....	May 1, 1974	1310.00
C-17130.....	Colorado.....	Dec. 1, 1973	241.10

INQUIRY NO. 2

Is the suspension of the issuance by the United States of coal prospecting permits announced February 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

Finding

The suspension of the issuance by the United States of coal prospecting permits, announced by Secretarial Order No. 2952 issued February 13, 1973 and attached as Exhibit II to Secretary Morton's affidavit of October 26, 1973, is still in effect. The Interior Department has not, since February 13, 1973, issued any coal prospecting permits in the Northern Great Plains region as defined by plaintiffs in their complaint.

INQUIRY NO. 3

To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973?

Finding

The Department of the Interior has not, since February 17, 1973, approved any coal leasing on

Indian lands within the Northern Great Plains region as defined by plaintiffs in their complaint.

INQUIRY NO. 4

Have any applications for permits for rights-of-way over lands within national forests in the Northern Great Plains region been considered or acted upon by the Department of Agriculture since June 30, 1974? Have any applications for permits for rights-of-way over navigable rivers in the Northern Great Plains region been considered or acted upon by the Corps of Engineers since June 30, 1974?

Finding

Since June 30, 1974 the Department of Agriculture has received the following four applications for rights-of-way over lands within national forests within the Northern Great Plains region as defined by plaintiffs in their complaint, all four on the Thunder Basin National Grasslands in Wyoming: by Wycoalgas Co. (water transmission line right-of-way); Rochelle Coal Co. (conveyer belt right-of-way); Atlantic Richfield Co. (plant site and railroad spur right-of-way). No action will be taken on any of these applications pending completion of an Environmental Analysis Report as to each by the Forest Service of the Department of Agriculture to determine whether or not an environmental impact statement pursuant to the National Environmental Policy Act is necessary and the completion of such an impact statement if one is found to be necessary.

The Corps of Engineers has, since June 30, 1974, issued no permits for rights-of-way over navigable rivers within the Northern Great Plains region as de-

fined by plaintiffs in their complaint. The following application in that region is pending: Minnkota Power Coop., transmission line crossing of Missouri River near Price, North Dakota. The Corps has, since June 30, 1974, issued two permits for structures in navigable rivers within that region: Square Butte Electric Co., water intake structure for generating plant cooling, near Bismarek, North Dakota (issued September 23, 1974); and Ottertail Power Co., removal of water intake structure for abandoned power plant near Washburn, North Dakota (issued October 15, 1974). Two applications for permits for structures in this region are pending: Michigan-Wisconsin Pipeline Co., water intake structure for coal gasification plant near Beulah, North Dakota; and Consolidated Development Co., water intake structure out of Oahe Lake for multiple purposes.

INQUIRY NO. 5

Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

Finding

A draft interim report of the Northern Great Plains Resource Program was released on September 27, 1974⁴ to the participants in that study program for their comments by November 1, 1974; and a revised interim report of the study program is expected to be released to the public by the end of February 1975. The separate reports of the seven work groups of the

⁴This report was identified by William W. Lyons, Deputy Undersecretary of the Interior (Plaintiff's Exhibits 1, 2A, 2B, and 2C) at his deposition on November 4, 1974.

study program will also be released for public inspection at various locations. Thereafter the study program will continue to coordinate federal and state energy related studies, and further studies in specific subject areas will be conducted by appropriate federal and state entities.

INQUIRY NO. 6

Does the United States Government contemplate the preparation of any future environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

Finding

Decisions by the Department of Interior concerning the scope of future environmental impact statements in the Northern Great Plains region as defined by plaintiffs in their complaint, the Fort Union Formation, or any subregion thereof, will be based upon information developed from such sources as Interior's coal programmatic impact statement and the Northern Great Plains Resources Program and from the nature and proximity of pending and proposed projects. The following statement in Interior Secretary Morton's affidavit of October 26, 1973 remains the most definitive description of that Department's posture with respect to future impact statements:

It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner.

The Department of Agriculture, through its Forest Service, has completed one impact statement (Badlands Planning Unit, Custer National Forest in North Dakota, August 1974) and plans the following six others, on other than individual projects, within the Northern Great Plains region as defined by plaintiffs in their complaint, the Fort Union Formation, or any subregion thereof: Rolling Prairie Planning Unit, Custer National Forest in North Dakota, estimated for July 1975; Cave Hills Planning Unit, Custer National Forest in South Dakota, estimated for December 1975; Ashland Division Land Use Plan, Custer National Forest in Montana, estimated for May 1976; Big Horn Land Use Plan, Big Horn National Forest in Wyoming, estimated for some time in 1977; and Thunder Basin National Grassland Land Use Plan in Wyoming, estimated for some time in 1977. The foregoing impact statements relate or will relate to overall land use planning by the Forest Service in the management and administration of the National Forests and National Grasslands and concern coal and other energy development only as one of many considerations in land management.

INQUIRY NO. 7

What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

Finding

The Forest Service of the Department of Agriculture has no plans to grant water rights or water contracts in the Northern Great Plains area as defined by the plaintiffs in their complaint.

Neither the Bureau of Reclamation of the Department of the Interior nor the Army Corps of Engi-

neers grants water rights. The issuance of a water right permit is solely under the jurisdiction of the individual states.

The Bureau of Reclamation has executed no option contracts for water in the Northern Great Plains Region as defined by plaintiffs in their complaint since July 1971, and denied one such application in September 1973. The Bureau has pending twelve applications (from nine entities) for option contracts to purchase annual quantities of 502,000 acre-feet of water from the Yellowstone Unit of the Pick-Sloan Missouri Basin Program on the Big Horn River and one application for 9,000 acre-feet of water from the Boysen Unit of that Program on the Wind River. Applications are also pending for annual water needs for industrial use totaling 630,000 acre-feet from four entities to divert water from the Wind-Big Horn-Yellowstone River system; from seven entities to divert 360,000 acre-feet of water from Fort Peck Reservoir; from one entity to divert 18,000 acre-feet of water from Lake Tschida (Heart Butte Unit, North Dakota); and from five entities to divert 286,816 acre-feet of water from Lake Sakakawea (Garrison Reservoir, North Dakota). Some of the foregoing units of the Pick-Sloan Missouri Basin Program include joint responsibility with the Army Corps of Engineers. The Departments of the Army and the Interior are currently working to establish common marketing procedures to handle anticipated industrial water sales from main stem reservoirs in the Missouri River Basin. Finalization of one or more of the pending applications may materialize and require Secretarial approval prior to resolution of this case.

The Army Corps of Engineers is currently studying the type of contract and other marketing matters respecting the sale of water for industrial use from

the Missouri River main stem reservoirs and has pending eleven applications by industrial users for purchase of 441,000 acre-feet of water per year. In addition, the Missouri River Division of the Corps is considering entering into water contracts with Lake Andes, South Dakota (municipal use), Sanitary and Improvement District No. 2 of Knox County, Nebraska (municipal and industrial use); Bowman County Water Management District, North Dakota (municipal and industrial use); and City of Gettysburg, South Dakota (municipal and industrial use).

INQUIRY NO. 8

How was the area to be covered by the EIS for the development of coal resources in the Eastern Powder River Coal Basin defined and how was it determined that an EIS was appropriate for that area?

Finding

The appropriateness of the Eastern Powder River Coal Basin Impact Statement⁵ and the definition of the area covered were determined as a result of consultations among the Department of Agriculture, the Department of the Interior, and the Interstate Commerce Commission, after a meeting on January 16, 1974 chaired by Deputy-Undersecretary of the Interior, William W. Lyons. The decision to do an impact statement on that area was made after applications for approval of mining plans and necessary rights-of-way were submitted by the Atlantic Richfield Company, the Carter Oil Company, the Kerr-McGee Corporation, and the Wyodak Resources Development Corporation, and an application to the Interstate Commerce Commission for construction of a railroad line

⁵ Issued October 18, 1974.

was submitted by the Burlington-Northern, Inc., and the Chicago and Northwestern Transportation Company. The general parameters of the statement area were set out on a map which was distributed at the January 16 meeting. There was no discussion of the factors listed in the preface of the Final Impact Statement (quoted below) at this meeting. The exact boundaries of the areas to be covered were then refined by the field team charged with preparing the final statement.

The preface of the Final Impact Statement, contains a further explanation of how the area was determined:

The four federal agencies have determined that approval of the pending applications would collectively constitute a major federal action having a significant effect on the quality of human environment. Therefore, the agencies have determined that to protect the public interests most effectively and to meet their individual responsibilities under the National Environmental Policy Act of 1969 most efficiently, they should jointly undertake the preparation of a single environmental impact statement which would consider not only the impacts of the several proposals but also the collective, cumulative impacts, primary and secondary, of the development of the coal resources in the area.

Further, to meet the intent of the Act in the most productive fashion, it is necessary to examine the general geographic area of the proposed and potential actions. The geographic area for basic consideration is that part of the Powder River Coal Basin in Wyoming lying generally eastward from the Powder River to the outcrop line of the coal resource and from somewhat north of Gillette to a point somewhat south of Douglas. The area delineation is based

in part on present and anticipated levels of mining activity, differing quality of the coal resource, different physical arrangement of the coal beds, somewhat different mining techniques required and differing physical reclamation requirements. These considerations having a broader scope of geographic impact such as social conditions, economic factors, atmospheric influence, water resources, and recreation uses are treated on a larger regional basis than the primary study area. This statement discusses the existing environment, evaluates the collective impact of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area described above. This statement also examines in detail certain proposed activities for which federal actions are required.

INQUIRY NO. 9

Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after February 17, 1973, or prepared for projects that were commenced after that time—

- a. Provide one or more representative statements.
- b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area?
- c. Do the statements take into account the ecological setting created by private action in the area?
- d. Has the government devised any procedure for cross-referencing among the individual statements?

Finding

9a The Forest Service of the Department of Agriculture has not issued, after February 17, 1973, any

impact statements on individual projects relating to coal development in the Northern Great Plains area as defined by plaintiffs in their complaint.

The Department of Interior has issued the following three impact statements on projects within the Northern Great Plains as defined by plaintiffs in their complaint, and a copy of each is attached to these findings: "Crow Ceded Area Coal Lease, Westmoreland Resources Mining Proposals," attached hereto as Exhibit A; "Proposed Plan of Mining and Reclamation, Big Sky Mine, Peabody Coal Company Coal Lease M-15965, Colstrip, Montana," attached hereto as Exhibit B; "Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming," attached hereto as Exhibit C.

9b The impact statements contain comprehensive descriptions of the cumulative impact of the governmental action on the surrounding area and this is established by the statements themselves. See for example, Chapter II of the Westmoreland EIS which contains over 100 pages discussing the environmental setting, and physical environment, and also Chapter III which discusses environmental impacts on the human environment, the physical impact, and impact on the market area.

The Peabody Environmental Impact Statement, contains a comprehensive description of the environmental impact of the proposal (pages 115-189) and, assesses the cumulative impact of the governmental action on the surrounding area.

The Eastern Powder River Coal Basin Environmental Impact Statement contains a comprehensive analysis of the environmental impact of the future federal action and considers past and possible future federal actions in the area relating to uranium (I-4

191-194), oil and gas development (I-186-190), and coal gasification proposals (I-40-41, 57, 94-102). Chapter V of this Statement "Probable Cumulative Regional Impacts," sets forth a regional analysis of the potential impact of coal development on such factors as socio-economic conditions, land tenure, transportation, recreation, and agriculture.

9c The impact statements consider the ecological setting created by private activity in a general way with regard to demography and economic and social conditions within the areas covered by the statement.⁶ The government's knowledge of private industry's expectation regarding coal development is largely based on applications for mining plans or competitive coal leases submitted by private industry.⁷

9d The government has not devised any regular formalized procedure for cross-referencing among impact statements on individual projects. Cross referencing in future statements will be utilized however, where necessary to describe the existing environment which could be impacted by proposed actions.

The three representative impact statements attached to these findings do cross-reference to a limited degree. The Eastern Powder River Coal Basin impact statement contains parts relating to each of five different proposals and a separate part consisting of a regional analysis of the cumulative environmental impact on the entire Eastern Powder River Coal Basin. There are thus cross references among individual proposals within the Eastern Powder statement. The Westmoreland Impact Statement contains a number of references to impact statements on other projects,

⁶ See Westmoreland EIS at 93-99; Peabody EIS at 139-149; Eastern Powder EIS at I-392-458.

⁷ See Lyons deposition at 118.

marked by number in the text and appearing at the end of the Statement in a Table of References.⁸ The Peabody Statement refers to other impact statements in a Table of References but does not correlate these to the text.⁹

NOVEMBER 25, 1974.

BARRINGTON D. PARKER,
United States District Judge.

⁸ See Westmoreland EIS at 201 ff.

⁹ See Peabody EIS at 430 ff.

APPENDIX F

United States Court of Appeals for the District of
Columbia Circuit

September Term 1974, Civil 1182-73, Filed, June 16,
1975; Hugh E. Kline, Clerk

No. 74-1389

SIERRA CLUB, ET AL., APPELLANTS

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED
STATES DEPARTMENT OF THE INTERIOR, ET AL.

Appeal from the United States District Court for
the District of Columbia.

Before: BAZELON, Chief Judge, WRIGHT and MAC-
KINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on
appeal from the United States District Court for the
District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged
by this Court that the judgment of the District Court
appealed from in this cause is hereby reversed and this
case is hereby remanded to the District Court, in ac-

cordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court.

HUGH E. KLINE,
Clerk.

Date: JUNE 16, 1975.

Opinion for the Court filed by Circuit Judge Wright.

Dissenting opinion filed by Circuit Judge MacKinnon.

Nos. 75-552 and 75-561

Supreme Court, U. S.
FILED

OCT 16 1975

MICHAEL RODAN, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

KENT FRIZZELL, *et al.*, *Petitioners*,

v.

SIERRA CLUB, *et al.*, *Respondents*.

AMERICAN ELECTRIC POWER SYSTEM, *et al.*, *Petitioners*,

v.

SIERRA CLUB, *et al.*, *Respondents*.

On Petitions for Writs of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**BRIEF OF THE CARTER OIL COMPANY
AS AMICUS CURIAE IN SUPPORT OF THE
PETITIONS FOR WRITS OF CERTIORARI**

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IN THE
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**BRIEF OF THE CARTER OIL COMPANY
AS AMICUS CURIAE IN SUPPORT OF THE
PETITIONS FOR WRITS OF CERTIORARI**

THE INTEREST OF THE AMICUS CURIAE

The Carter Oil Company ("Carter"), having obtained consent from each party, submits this brief as *amicus curiae* in support of the Petitions for Writs of

Certiorari.¹ The basic facts underlying Carter's interest in this litigation are as follows.

During the last eight years Carter has been working assiduously toward the development of a major coal-mining enterprise in the so-called Eastern Powder River Coal Basin of Wyoming. During that eight-year period the principal events have been as follows: (1) In 1967 the United States Department of the Interior held a competitive lease sale covering some 5,400 acres in Wyoming, and the high bid of over \$900,000 was submitted on Carter's behalf to obtain the lease (Federal Coal Lease W-5036); (2) Carter has either purchased or obtained options to purchase all surface land overlying the lease (except for approximately 40 acres that is public domain land); (3) Carter developed and submitted to the Department of the Interior in April 1973 a plan for the mining of the coal resources of the lease and for the reclamation of the lands subsequent to mining, and the Secretary of the Interior has indicated his readiness to approve Carter's plan; (4) as to the environmental consequences of the Carter mining and reclamation plan the Department of the Interior has prepared a 173-page environmental impact statement (which appears as Part IV of the Final Environmental Impact Statement for the Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming (pages IV-1 through IV-173), issued October 18, 1974); (5) Carter has signed a 30-year sales contract with a major electrical utility company, under which Carter is called upon to deliver five million tons of low-sulphur coal per year, with deliveries sched-

¹ Copies of Carter's requests for the consent of each party to the filing of this brief, and the affirmative replies thereto, have been filed with the Clerk of this Court.

uled to begin in mid-1976; (6) in aid of its proposed mining operations Carter has commenced extensive construction of off-lease surface facilities for site preparation costing, through July 31, 1975, approximately \$8,200,000; (7) through July 31, 1975, Carter's total expenditures in furtherance of the proposed operation have amounted to approximately \$12,800,000; and (8) Carter is contractually committed to expenditures of approximately \$11,200,000 including equipment ordered for this lease in the coming two years.

The entire project, however, has been brought to a halt by the injunction entered by the Court of Appeals below. Although the Secretary of the Interior has indicated his readiness to approve Carter's plan and Carter is now ready to commence mining on its lease, the Court of Appeals' injunction has precluded the Secretary from acting on Carter's proposed mining and reclamation plan. The injunction therefore has totally disrupted Carter's project at a very substantial cost, both in terms of money and in terms of relations with equipment suppliers, employees, customers, and ultimate consumers of electrical energy.

ARGUMENT

Carter adopts the arguments of the Federal petitioners and the intervenors in support of their petitions for certiorari.

The drastic consequences of the decision of the Court of Appeals below are cogently illustrated by the dilemma in which Carter now finds itself. The Federal official who bears the responsibility for the preparation of environmental impact statements with respect to Federal coal leases (*i.e.*, the Secretary of the Interior) has decided, in his discretion, that the proper

way to analyze the environmental impact of a number of proposed projects in the Eastern Powder River Coal Basin is to prepare a single statement covering all pending mining plans and related applications centering in that area. Having made that discretionary determination, the Secretary has in fact prepared such a comprehensive Environmental Impact Statement, and in it he has devoted no less than 173 pages of discussion to the specific mining and reclamation plan proposed by Carter. Most significantly, it has never been claimed, either in this lawsuit or in any other, that the foregoing Environmental Impact Statement fails to comply with NEPA or any other law. *Prima facie*, therefore, it would seem that the Secretary of the Interior should now be free to approve Carter's mining and reclamation plan and that Carter itself should be free to move forward with the project in aid of the country's urgent need for additional sources of energy.

The Court of Appeals, however, has acted squarely to the contrary. Although the Sierra Club concedes that the Federal petitioners have never made any "proposal" for region-wide development of the four-state Northern Great Plains Area, the Sierra Club nevertheless thinks that that should have been done, and on that basis the Court of Appeals has, in effect, enjoined the entire Carter mining and reclamation project—despite the fact that there exists today an unchallenged Environmental Impact Statement on that exact project.

The erroneous application of NEPA by the Court of Appeals, taken together with its far-reaching impact on the energy resources of the country, warrants the granting of the petitions for certiorari.

CONCLUSION

Carter, as *amicus curiae*, urges that the Petitions for Writs of Certiorari be granted.

Respectfully submitted,

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OCT 16 1975

MICHAEL REDAK, JR., CLERK

IN THE
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OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

BRIEF

for Western Fuels Association, Inc., Basin Electric Power
Cooperative, Inc., Heartland Consumers Power District,
Lincoln Electric System, Missouri Basin Municipal
Power Agency, Tri-State Generation and Trans-
mission Association, Wyoming Municipal
Power Agency and Cajun Electric Power
Cooperative, Inc.

AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR
A WRIT OF CERTIORARI

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CITATIONS

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Act of June 21, 1906, 34 Stat. 326, 25 U.S.C. § 391 <i>et seq.</i> (1970 ed. & Supp. III)	10
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mission Association, Wyoming Municipal
Power Agency and Cajun Electric Power
Cooperative, Inc.

**AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR
A WRIT OF CERTIORARI**

This brief is submitted in support of the petitions of
Kent Frizzell, et al., and of American Electric Power

System, et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton*, et al., 514 F.2d 856. All parties have consented to the filing of this brief and their consents have been lodged with the Clerk.

DESCRIPTION AND INTEREST OF AMICI CURIAE¹

Western Fuels is a non-profit membership corporation whose purpose is to obtain coal and other fuel supplies required for the generation of electric energy by its members to serve the needs of the consumers of each member. Western Fuels membership comprises consumer owned and publicly owned electric utilities. Basin, Tri-State, Cajun and Lincoln are members of Western Fuels.

Basin is a generation and transmission cooperative headquartered in Bismark, North Dakota. Basin was organized by member cooperatives to provide constituent members with self-generated thermal power. Basin, through its member cooperatives, serves more than 100 rural electric cooperatives in North and South Dakota, Montana, Wyoming, Colorado, Nebraska, Minnesota and Iowa. Through this system of distribution, Basin serves the power needs of more than 300,000 rural families, businesses and industries, a group in excess of one million people. The great

¹ The following references identify the respective amici curiae: Western Fuels Association, Inc.—“Western Fuels”; Basin Electric Power Cooperative, Inc.—“Basin”; Heartland Consumers Power District—“Heartland”; Lincoln Electric System—“Lincoln”; Missouri Basin Municipal Power Agency—“MBMPA”; Tri-State Generation and Transmission Association—“Tri-State”; Wyoming Municipal Power Agency—“WMPA”; Cajun Electric Power Cooperative, Inc.—“Cajun”.

majority of Basin's ultimate consumers are rural families.

Heartland is a public corporation and political subdivision of the State of South Dakota. Heartland's function is to engage in wholesale bulk power supply and activities incidental or related thereto. Heartland is required to sell electrical energy at wholesale directly to any municipality, political subdivision, rural electric association, electric distribution cooperative, or any person, firm, association or corporation which in turn generates, transmits or distributes electricity on a non-profit basis in the State and which is engaged in the distribution and sale of electric energy. When any such entity makes application for the purpose of electric energy, Heartland must supply that power if it has the requested amount of electric energy available. At present, Heartland has fourteen members, thirteen of whom are municipal utilities located in South Dakota and one is a municipal utility located in Iowa.

Lincoln is a municipal utility owned by the City of Lincoln, Nebraska. The territory served by Lincoln encompasses the city limits and approximately three miles surrounding those limits. In addition, Lincoln owns and operates facilities serving surrounding villages and towns and assorted rural customers. Lincoln's energy requirements have nearly doubled since 1967. The major portion of its service area is the City of Lincoln which is a growing community with a diversified economy that links the large agricultural area nearby with areas of commerce, industry, government, and higher learning. The seat of the state and county government and the site of the 20,000 student University of Nebraska, Lincoln is also recog-

nized as a regional trade center. Lincoln's service area has a population of some 175,000.

MBMPA is a non-profit organization comprised of municipal utilities in the States of Iowa, Minnesota and South Dakota. MBMPA membership includes sixty-one systems serving a population base of approximately 220,000. MBMPA serves as a planning center and acts as a bargaining agent to supplement the power supply efforts of the individual member municipalities which are necessarily limited on a localized basis. This function of the agency offers the membership alternate planning schemes that incorporate the economies of scale ordinarily not available to individual municipal utilities when acting independently.

Tri-State is a non-profit wholesale power supplier for twenty-five distributing consumer owned utilities located in Colorado, Nebraska and Wyoming. Tri-State serves a 125,000 square mile area covering the western part of Nebraska, north-eastern Colorado, and a major part of Wyoming. Through its 25 distribution members, Tri-State serves more than 95,115 consumers. Although the majority of consumers are classified as rural residential, some are industrial and commercial.

WMPA is a non-profit organization comprised of nine Wyoming municipal utilities. WMPA was formed to supply supplemental power to its members after 1976 because their present supplier, the United States Bureau of Reclamation, will be unable to serve load growth of such members beyond 1976. WMPA is charged by its members to obtain supplemental power in the most economical manner, either through generation or purchase.

With the exception of Western Fuels, each of the aforementioned entities is a preference customer of the Bureau of Reclamation and purchases a substantial portion of their power and energy requirements from the Bureau. The Bureau is a federal agency, within the Department of the Interior, which markets the output of the federal government's extensive complex of hydroelectric projects in the Missouri River basin and elsewhere.

Basin, Heartland, Lincoln, MBMPA, Tri-State and WMPA, a map of whose service areas is included as Appendix A, have undertaken to construct the Laramie River Station, a large, thermal-electric generating plant to be located in Platte County in southeastern Wyoming. The site of the Laramie River Station is indicated on the map at Appendix A.

The Laramie River Station will have a net generating capacity, to be used for the benefit of the six participants, of 1500 megawatts, consisting of three 500 megawatt units, at an estimated construction cost, including backbone transmission lines, of some \$1,360,000,000. On line dates for availability of power from the Laramie River Station are no later than January 1, 1980 for the first unit, June 1, 1980 for the second unit and June 1, 1983 for the third unit.

The location, construction schedule and capacity of the Laramie River Station were determined as the result of extensive studies initiated by the participants in 1972, covering site, water and fuel supply, transportation facilities, transmission and economics.

These studies themselves represent a continuation and acceleration of joint planning efforts going back as far as 1962 on the part of consumer owned utilities

in the upper Missouri River Basin, covering all or parts of Montana, Wyoming, Colorado, North and South Dakota, Nebraska, Minnesota and Iowa. A major factor giving rise to this joint planning was the fact that the hydroelectric power available from the federal government's Pick-Sloan Missouri River Basin project and from other federal government hydroelectric power developments was insufficient to meet their load growth.

The objective of the joint planning is the installation of generating and transmission facilities on a schedule meeting power needs in a fashion calculated to achieve for the participants the economies of scale inherent in the construction of large base-load generating units, the advantages of integrating fossil-fueled generating units with the hydro-generation developments undertaken by the federal government as a part of the Pick-Sloan Missouri River Basin project, and the advantages of pooling together transmission facilities with costs shared on a proportionate use basis.

The power requirements of the consumers served by the six participants in the Laramie River Station are such that demand will exceed supply, with an ever-widening gap between need and supply, if the in-service schedules referred to above—i.e., unit one - January 1, 1980, unit 2 - June 1, 1980 and unit 3 - June 1, 1983—are not met.²

An important factor in the selection of the site for the Laramie River Station is its proximity to the

² For a detailed discussion and analysis of the participants' load growth and power supply needs, see "Preliminary Report on the Feasibility Study for the Laramie River Station," July 1, 1975. Burns & McDonnell Consulting Engineers. Copies will be made available to all parties and to the Court upon request.

Eastern Powder River Coal Basin of Wyoming which, as the Federal-Petitioners point out, contains more than one quarter of the nation's strippable coal reserves.³

Western Fuels is responsible for securing the coal supplies for the Laramie River Station. It has arranged for three separate sources of coal from the Eastern Powder River Coal Basin.

Western Fuels has acquired applications pending before the Department of the Interior for the issuance of preference right coal leases under Section 2 of the Federal Mineral Leasing Act of 1920, 30 U.S.C. 201, covering Eastern Powder River Coal Basin coal, which it estimates will produce at least 60 million tons of coal by surface mining.

Western Fuels has contracted with Sunoco Energy Development Co. for the purchase of 60 million tons of coal from the Cordero Mine in the Eastern Powder River Coal Basin on a delivery schedule consistent with start-up needs at the Laramie River Station. Sun holds the Cordero Mine under a lease from the Secretary of the Interior issued in 1971 pursuant to the coal leasing provisions of the Federal Mineral Leasing Act. 30 U.S.C. 201, *et seq.*

Western Fuels has entered into contractual arrangements with El Paso Energy Resources Company, which itself has acquired certain preference right lease applications for coal in the Eastern Powder River Coal Basin pending before the Department of the Interior, under which coal will be supplied from that source.

³ Petition for Writ of Certiorari, *Frizzell, et al. v. Sierra Club, et al.*, at 8.

Sun's application for approval of the mining plan for the Cordero Mine is presently before the Secretary of the Interior. A site-specific environmental impact statement covering the mining plan is under preparation by the Department of the Interior. Analyses within the Department of the Interior of the applications for preference right leases held by Western Fuels and El Paso are in progress.

The court below clearly considers the Eastern Powder River Coal Basin to be encompassed within the larger "Northern Great Plains Region" which is the subject of its judgment and injunction.

The admonition by the court below that the federal defendants take no action anywhere in the "Northern Great Plains Region" which would defeat the purpose of an environmental impact statement for the "Northern Great Plains Region" while the need for the latter is evaluated necessarily results in delay in final actions on Eastern Powder River coal sources of critical importance to the participants in the Laramie River Station, at least until a regional impact statement is issued and approved or until further lengthy litigation ensues. In the absence of a reliable source of coal from the Eastern Powder River Coal Basin, the timing of the completion and operation of the Laramie River Station is delayed and, indeed, the entire project may be placed in jeopardy, with resultant irreparable harm not only to the consumers of electric energy in participants' service areas, but to the general economy of those areas as well.

Cajun is a non-profit electric power system serving rural customers in Louisiana. Cajun is a wholesale power supplier for twelve of the thirteen rural electric

cooperatives now existing in Louisiana. Cajun's members' service areas encompass approximately 80% of the surface area of the State, and have a population of approximately 750,000.

Cajun presently generates 35% of its requirements from Big Cajun No. 1, and purchases the remainder of its requirements from investor owned utilities in Louisiana. Based on representations of its suppliers that Cajun will no longer be able to rely on them to meet its power and energy needs, Cajun is in the process of developing two additional 540 megawatt coal fired generating units to be known as Big Cajun No. 2. The first of these units is scheduled to go on line in the last quarter of 1979; the second in the third quarter of 1980. Both are needed if Cajun is to meet increasing requirements for reliable and economical power and energy for Louisiana's rural people, agriculture and industry in the 1980's. When fully operational, Big Cajun No. 2 will require approximately four million tons of coal per year.

To assure an adequate source of coal, Cajun has executed a contract with Shell Oil Company for coal to be mined from the Youngs Creek Mine in Big Horn County, Montana, on the Crow Indian Reservation, a part of the "Northern Great Plains Region" as conceived by the court below. In addition, Cajun has executed a contract with Pullman Standard, division of Pullman, Inc., for 848 open top gondola cars to ship by rail Youngs Creek coal from Montana to St. Louis, Missouri. From St. Louis, American Commercial Barge Line Co. has contracted to barge the coal on the Mississippi River to the Big Cajun No. 2 plant site.

Shell Oil Company's right to Youngs Creek coal is derived by virtue of a lease issued Shell by the Crow

Tribe. Pursuant to 25 U.S.C. 391, *et seq.*, the Secretary of the Interior has the jurisdiction to approve mineral leases of Indian lands by various Indian tribes, including the Crow Tribe.⁴ As a corollary to this jurisdiction, the Secretary has, by regulation, exerted jurisdiction over the actual extraction of minerals by virtue of requiring Department approval of mining plans developed by the leaseholder.

Shell is in the process of securing Department approval for its coal development and, thus, the decision of the Court below effectively enjoins the federal defendants from going forward on approval of the Youngs Creek Mine. As a result, in a fashion similar to the consequences of the delays in federal approvals needed for the coal supply for the Laramie River Station, the timely delivery of coal for Big Cajun No. 2 is endangered, thereby jeopardizing the power supply for Cajun's rural customers.

REASONS FOR GRANTING THE WRIT

Amici curiae join the Federal-Petitioners and the Intervenor-Petitioners in their analyses of the reasons for the granting of this writ.

Briefly, these reasons are: that the decision below is in conflict with this Court's decision in *Aberdeen & Rockfish RR v. SCRAP*, No. 73-1966 (June 24, 1975); that the decision below is in conflict with decisions in the Court of Appeals for the Fifth, Ninth and Tenth

⁴ The lease was approved by the United States Department of the Interior on June 8, 1972. The validity of the Shell lease, along with other Crow Tribe leases, is presently being challenged in the United States District Court for the District of Columbia in *Crow Tribe of Indians v. Dale K. Frizzell, et al.*, No. 75-153.

Circuits;⁵ that this case is of vital importance in interpreting the National Environmental Policy Act;⁶ and that the decision below was in error in that it did not affirm the district court's judgment that there was no existing or proposed federal program for the development of coal in the region described by the Complainants, thus, the National Environmental Policy Act does not require the issuance of an environmental impact statement.

In amplification of the rationale behind this final reason for granting the writ, these amici curiae emphatically state that they are in no way taking part in any existing or proposed regional federal programs for either coal development or additional power supply. Indeed, these amici curiae know of no such programs and, to the contrary have been required to undertake to develop their own programs of power development and fuel supply, in part due to the urgings of the federal government's power marketing agencies. Western Fuels, the Laramie River Station, Big Cajun No. 2, and the actions taken to procure coal herein described, were initiated, fostered and carried on by the respective parties themselves. The actions taken, and to be taken by the federal government in regard to these energy related activities is not one of initiation or proposal. Rather, the federal government is merely fulfilling its duty to act upon independently conceived

⁵ *Sierra Club v. Callaway*, 499 F. 2d 982 (5th Cir. 1974); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F. 2d 1275 (9th Cir. 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 487 F. 2d 814 (9th Cir.), *affirming* 356 F. Supp. 131 (N.D. Cal. 1973); *Trout Unlimited v. Morton*, 509 F. 2d 1276 (9th Cir. 1974); *Sierra Club v. Stamm*, 507 F. 2d 788 (10th Cir. 1974).

⁶ 42 U.S.C. 4321, 4331-4335, 4341-4347.

proposals and applications presented by private parties.

CONCLUSION

In light of the error of the judgment below and the gravity of the issues involved, the writ of certiorari should be granted.

Respectfully submitted,

Dated: October 16, 1975

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CERTIFICATE OF SERVICE

I, Edward Weinberg, hereby certify that on October 16, 1975 the Brief for Amici Curiae in Support of Petitions for a Writ of Certiorari in the above captioned proceeding was served upon all counsel, pursuant to Rule 33 of the Supreme Court Rules, by mailing copies by first class mail, postage prepaid, as follows:

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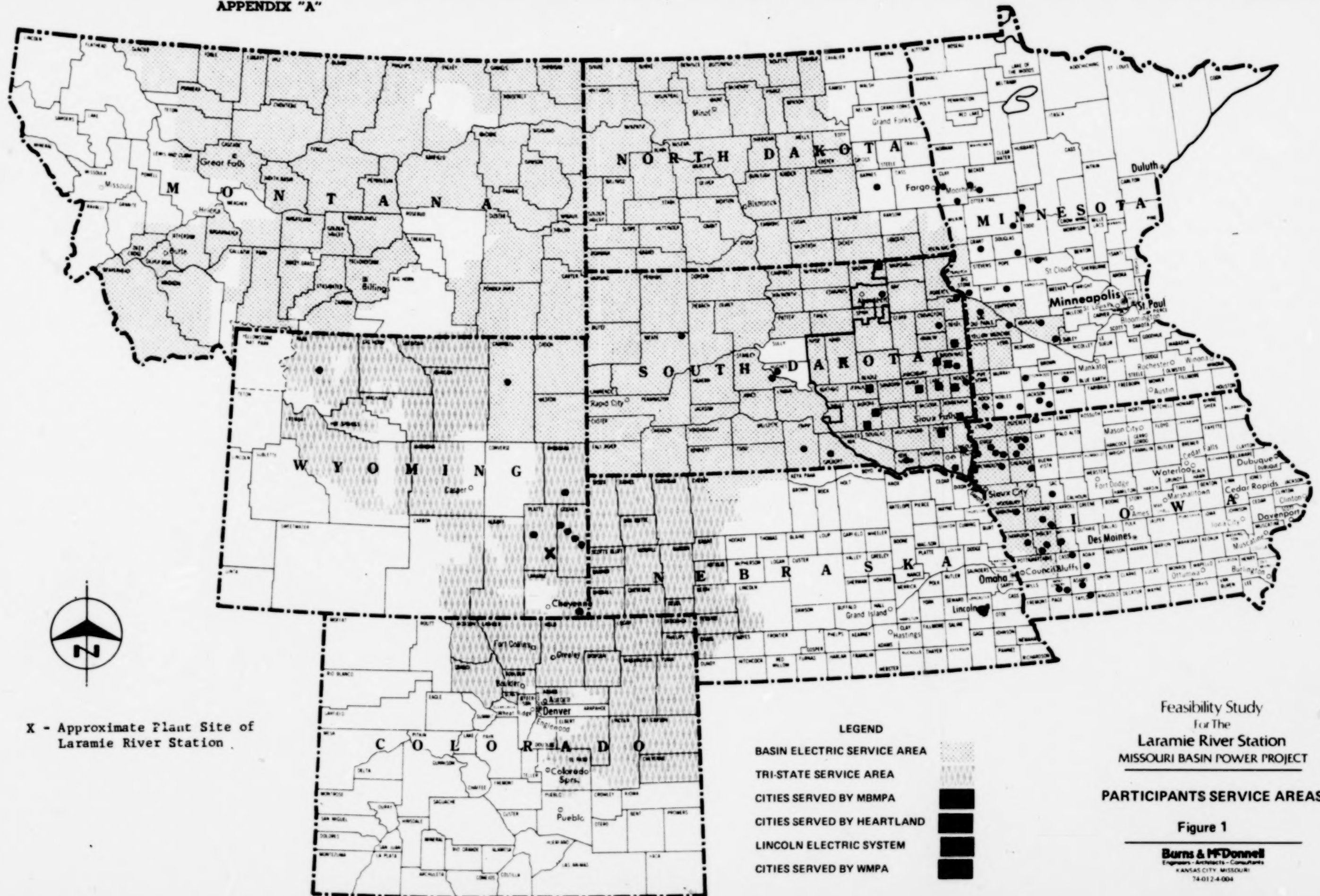
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APPENDIX

APPENDIX "A"



X - Approximate Plant Site of
Laramie River Station

MOTION FILED

OCT 17 1975

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners

v.

SIERRA CLUB, INC., ET AL., *Respondents*

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF**

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association.

**AS AMICI CURIAE IN SUPPORT OF PETITIONS
FOR A WRIT OF CERTIORARI.**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR,
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No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners

v.

SIERRA CLUB, INC., ET AL., *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association respectfully move for leave to file the attached brief *amici curiae*.

The consent of the attorney for the Respondents was requested but refused, and the consent of the attorneys for the other parties has been requested. Five of those

attorneys have consented. No responses have been received from the others.

The interest of the Movants in this case arises because many of the members of each of the *Amici* either purchase or plan to purchase coal produced in the area affected by the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton, et al.*, 514 F.2d 856 (D.C. Cir. 1975), or purchase power and energy at wholesale from suppliers who purchase or plan to purchase coal produced in such area. Such members of the Movants are consumer-owned utilities, most of them relatively small. They are either publicly-owned utilities or non-profit, cooperative rural electric associations. The latter are owned and controlled by their consumer-members. Their sole function is to obtain electric power and energy at the lowest possible costs. The cooperatives furnish service in sparsely settled rural areas and have very few large commercial or industrial loads.

In view of the unique nature of the problems faced by the Movants as a result of the Court of Appeals' decision, their interests in this case will not be fully presented by any other party.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners

v.

SIERRA CLUB, INC., ET AL., *Respondents*

BRIEF

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association.

**AS AMICI CURIAE IN SUPPORT OF PETITIONS
FOR A WRIT OF CERTIORARI.¹**

This brief is submitted in support of the petitions of Kent Frizzell, et al., and of American Electric Power System, et al., for a writ of certiorari to review the

¹ The *Amici* are referred to hereafter as follows: AMERICAN PUBLIC POWER ASSOCIATION—"APPA"; COLORADO RURAL ELECTRIC ASSOCIATION—"COLORADO"; MID-WEST ELECTRIC CONSUMERS ASSOCIATION, INC.—"MID-WEST"; MONTANA ASSOCIATED UTILITIES

judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton*, et al., 514 F.2d 856 (D.C. Cir. 1975).

I. DESCRIPTION AND INTEREST OF AMICI CURIAE

American Public Power Association is the national association of more than 1400 local, publicly-owned electric utilities in 48 states, Guam, Virgin Islands, American Samoa and Puerto Rico. A number of these electric systems are large, but most are small cities, towns and villages. A large number, particularly in the Western states, are dependent upon the production of coal in the Northern Great Plains and future planning depends upon the availability of such coal. A sizeable number operate their own generating units requiring that coal. Many others purchase power at wholesale from suppliers which are dependent upon the availability of such coal.

Illustrative of the crippling problems faced by the APPA members dependent upon Western coal are the following three instances:

Muscatine Power & Water, the agency of the city of Muscatine, Iowa which operates the municipal electric system, is planning the installation of a new fossil-fired generating unit to be in commercial operation January 1, 1982. It has surveyed the major coal suppliers to

—"MONTANA"; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION—"NRECA"; NEBRASKA RURAL ELECTRIC ASSOCIATION—"NEBRASKA"; NORTH DAKOTA ASSOCIATION OF RURAL ELECTRIC COOPERATIVES—"NORTH DAKOTA"; NORTHWEST PUBLIC POWER ASSOCIATION—"NORTHWEST"; SOUTH DAKOTA RURAL ELECTRIC ASSOCIATION—"SOUTH DAKOTA"; WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION—"WASHINGTON"; AND WYOMING STATE RURAL ELECTRIC ASSOCIATION—"WYOMING".

determine the cost and availability of low sulphur coal in the quantities required to operate the new plant. It encounters the same problem time and time again. The coal suppliers indicate that the uncertainty of the outcome of *Sierra Club v. Morton* prevents them from seriously discussing or making any commitments with respect to low sulphur coal from their strip mining operations in the Western states.

The Board of Public Utilities of Kansas City, Kansas, is now purchasing approximately 150,000 tons of coal from Wyoming annually. It is estimated that its need for Western coal will increase to 850,000 tons annually by 1979 when its new Nearman Creek Power Station is scheduled to be put in service at that time. It has been unable to obtain contracts to date that will insure the coal necessary to satisfy its requirements. It would appear certain that the required coal cannot become available by 1979 unless *Sierra Club v. Morton* is overturned.

Another member of APPA which would be severely injured if *Sierra Club v. Morton* were permitted to stand is Nebraska Public Power District which has one of the largest electric systems of any of the APPA members. It furnishes electric service at retail to 260 municipalities and communities and supplies at wholesale the total requirements of 74 municipalities, public power districts and rural electric cooperatives. In the aggregate these customers account for approximately one-half of the electrical power load of the State of Nebraska. Also 20 municipal electric systems with generating facilities of their own have interconnection agreements with Nebraska Public Power District pursuant to which they may purchase part of their requirements from the District.

The District now has under construction a 650 MW coal burning power plant. The estimated construction cost of the plant is approximately \$288 million and it has already obligated approximately \$195 million in contracts and commitments for engineering, equipment and construction of the project and has already expended approximately \$95 million. Commercial operation of the plant was originally scheduled for mid-1977 but because of environmental delays is now planned for mid-1978.

The District plans to use low sulphur coal to minimize the environmental impact at the generating station and has entered into a coal supply agreement with Atlantic Richfield Company to purchase low sulphur coal for the new station from Atlantic Richfield's planned coal mining operation in Campbell County, Wyoming. The injunction in effect in this case is stopping the construction and development of the Atlantic Richfield mine.

Any delay in the operation of the new station will result in unnecessary expense to the District and its rate payers. This expense, while difficult to estimate with any degree of accuracy, would be enormous. If the District does not obtain the low sulphur coal from Campbell County, Wyoming, there is a substantial risk that its customers would be subject to electric power curtailments resulting in brown-outs and black-outs.

Mid-West Electric Consumers Association, Inc., with headquarters at Denver, Colorado, is the regional service organization of the rural electric cooperatives and publicly-owned electric systems located in the nine states comprising the Missouri Basin: Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota,

South Dakota and Wyoming. Mid-West is composed of approximately 250 systems, which serve almost 1,500,000 consumers. It was formed to obtain an adequate supply of low-cost and dependable electric power for these groups, and generally to promote the interests of electric consumers in the region.

A number of the members of Mid-West are located in or close by the Northern Great Plains. A very large percentage of the other members will also soon be dependent upon coal produced in that area. Until several years ago these members were able to purchase their power and energy requirements from the Bureau of Reclamation since they are preference customers under the Flood Control Act of 1944, which governs the sale of Missouri River power. The power sold by the Bureau to those members is generated at the government-owned dams located on the main stem of the Missouri River.

For the past few years it has been impossible for most of the members who are Bureau customers to obtain all of their requirements from that source because all of the available power has been placed under contract. In order to obtain an additional source at a reasonably low cost, the members banded together to organize generating and transmitting organizations. Examples of such organizations are Basin Electric Power Cooperative, Missouri Basin Municipal Power Agency, Tri-State Generation and Transmission Association and Wyoming Municipal Electric Joint Power Board. These organizations have joined with Western Fuels Association, Inc., and others in submitting a brief *amicus curiae* in this case. That brief explains the development of the Laramie River Project, in which the four organizations mentioned im-

mediately above are participants. That brief also explains the injury which will result to the participants in the Laramie River Project if the coal from the Northern Great Plains Area is not made available for use in the Laramie River Project by the time it is ready to go into commercial operation. Almost all of Mid-West's members will suffer serious injury if that project is not able to operate immediately upon completion because of lack of coal. It is highly probable that brown-outs and black-outs would result. Rationing of power would be a distinct possibility.

Other members of Mid-West purchase power from suppliers who are dependent upon coal purchased in the Northern Great Plains.

It must be emphasized that not only do Mid-West members operate on a strictly nonprofit basis but they are owned and controlled by their consumers. Mid-West wishes to raise its voice in support of the interest of those consumers. They are the ones who will suffer if the injunction now in effect is not lifted shortly.

Colorado, Montana, Nebraska, North Dakota, South Dakota, Washington and Wyoming are state-wide organizations, the members of which are borrowers from the Rural Electrification Administration. Each of them operates at the state-wide level in the same fashion as Mid-West does on a regional level. The members of each are deeply concerned about the possibility of brown-outs and black-outs resulting from the lower court injunction. Their worry is that in addition to the threat of blackouts and brownouts the cost of electricity to their ultimate consumer members will be greatly increased if the injunction is not set aside. Most of their members are also dependent upon

Basin Electric Power Cooperative and the Laramie River Project for all of their power requirements in excess of those which can be made available by the Bureau of Reclamation.

National Rural Electric Cooperative Association is the trade association of the rural electric cooperatives which have been chiefly financed by the Rural Electrification Administration, an agency of the United States. It has almost one thousand members located in 46 states serving approximately 25,000,000 ultimate consumers in rural areas. Approximately 180 of such members are located in Wyoming or adjoining states. Many of the members, located both within and without such states, operate coal-fueled generating plants which plan to purchase coal from mines to be located in the Northern Great Plains. A very large number buy power and energy at wholesale from suppliers proposing to purchase coal produced in that area.

The concerns of the members of NRECA are similar to those of the Mid-West and statewide organizations' members. Almost all of the rural electric cooperatives in Wyoming and surrounding States are members of NRECA. There are also a few members in other states which generate their own power and are dependent upon coal from the Northern Great Plains Area. There are a very large number of NRECA members who buy their electric power and energy requirements from other suppliers which are to a substantial extent dependent upon such coal.

The Environmental Impact Statement for the Eastern Powder River Coal Basin considered the mining plans of four mines, the approval of which is now being held up by the injunction. There is also pending

before the Department of Interior the mining plans for five additional mines, for which a draft Environmental Impact Statement will be issued this Fall. Also pending is an application for the extension of an existing mine. A draft Environmental Impact Statement for this mine was issued on March 24, 1975, with the final statement expected to be issued in the near future. The companies submitting the mining plans referred to in these paragraphs were Amax Coal Company, Atlantic Richfield Company, Carter Oil Company, Ker-McGee Corporation, Peabody Coal Company, Sun Oil Company and Wyodak Resources Development Corporation. The development of all these plans is, of course, stopped by the injunction.

Coal from the Belle Ayr South Coal Mine of Amax Coal Company is sold to: Interstate Power Company, Iowa Power & Light Company, Kansas Power and Light Company, Public Service Company of Colorado and South Western Electric Power Company.

Coal from Atlantic Richfield mines is sold to: Oklahoma Gas and Electric Company and South Western Public Service Company.

Coal from the Carter Oil Company mines is sold to: Indiana and Michigan Electric Company.

Coal from the Kerr McGee Corporation mines is sold to: Arkansas Power and Light Company, Arkansas and Missouri Power and Light Company, Central Louisiana Electric Company, Inc., Gulf States Utilities Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Services, Inc.

Coal from the Wyodak Resources Development Company mines is sold to: Black Hills Power and Light Company.

All of the electric utility companies listed above sell electric power to members of NRECA and most of them also sell electric power to members of APPA. In addition, Dairyland Power Cooperative, a member of NRECA, buys coal from the Belle Ayr South Coal Mine of Amax Coal Company and Nebraska Public Power District, a member of APPA, buys coal from Atlantic Richfield mines.

NRECA's members operate in sparsely settled areas. The average consumer density of all the rural electric systems in the country is 3.9 consumers per mile of distribution line. This contrast with an average consumer density of 35 consumers per mile experienced by the Class A & B electric utilities in the nation. The average consumer density of the NRECA members in Wyoming and nearby states is even much lower than is the national average. Those densities are as follows: Colorado 3.0; Idaho 2.9; Kansas 1.8; Montana 1.7; Nebraska 1.8; North Dakota 1.3; South Dakota 1.5; Utah 2.7 and Wyoming 1.7.

More than half of the total operations and maintenance expense of the rural electric systems is represented by the wholesale cost of power and energy. Thus the impact on the small systems, serving low consumer density areas with the resultant very large investment in facilities per consumer, would be tremendous if the low cost western coal is not made available to them.

Examples of the extremely serious problems which would be created for NRECA members which generate their own power are the situations which would be

faced by Cajun Electric Power Cooperative, Inc. and Dairyland Power Cooperative if the decision of the lower court remains in effect. The impact on Cajun is discussed in the brief *amici curiae* filed by Western Fuels Association, Inc., et al. in this proceeding.

Dairyland Power Cooperative is a large generating and transmission cooperative with headquarters at La Crosse, Wisconsin. The coal requirements of its Alma 6 generating unit are to be supplied by Amax Coal Company. If the latter is not permitted to supply coal to Dairyland's Alma 6 generating unit, Dairyland might possibly be able to install scrubbers and use midwest coal of higher sulphur content. The cost of the scrubbers would be \$3.3 million per year and the additional cost of coal would be approximately \$2,250,000 per year. There is no capacity in the power pool in which Dairyland is a participant from which Dairyland could purchase power to be used in lieu of the power proposed to be generated at Alma 6. Other companies in the pool are also depending upon the Wyoming coal. If Dairyland were forced to rely on purchases of power from other members of the pool after 1978, it would appear that Dairyland's members would be subjected to power outages.

Dairyland possibly could install oil-fired generation. However, in view of the oil supply shortage it would not appear to be a wise choice. The oil requirement would be approximately 115 million gallons. The added fuel cost would be approximately \$24.5 million per year.

It also should be pointed out that Dairyland does not at this time have any generating plants scheduled

for retirement, nor does it have any retired plants which could be reactivated. The construction of a nuclear plant would require a lead time of at least ten years. In short, Dairyland's Alma 6 plant, from any practical viewpoint, is entirely dependent upon western coal.

Northwestern Public Power Association is a regional association, the members of which are municipalities, public utility districts, and rural electric cooperatives, similar to Mid-West. Certain of its members are also dependent upon the availability of coal from the Northern Great Plains.

Each of the *Amici* fully supports an aggressive, effective environmental protection program. Certain of their members have taken the lead in cooperating with environmentalists in developing effective programs to harmonize strip mining and electric power generation with sound standards of environmental protection.

The *Amici* agree that the Interior Department has the responsibility in passing upon proposed mining plans to insist upon the most effective practical environmental protection measures. They believe that the Interior Department is doing this. They agree that Interior should prepare site-specific environmental impact statements and, where appropriate, broader impact statements such as the Eastern Power River Coal Basin Impact Statement based on factors described in the petition of the Federal Petitioners at pages 7 and 8.

However, the Court of Appeals, in attempting to force the government to engage in regional planning of

an area determined not by the government but by the respondents, has opened the door to a dangerous situation. Under the opinion of the Court of Appeals, anyone with an interest in a vaguely-defined area of the country could bring a halt to unrelated governmental activities, merely on the basis of geographical location within a self-defined province, until a provincial environmental impact statement has been issued and its adequacy judicially determined. This could be accomplished without bothering to challenge the adequacy of impact statements covering related regions within the area. Just as many members of the *Amici* are being hindered in their efforts to obtain necessary fuel and energy by the instant case, so too may every member, wherever located, be injured in the future by similar challenges.

What makes these future roadblocks so difficult to foresee, and thus plan for, is their arbitrary nature. The requirement of impact statements for inter-related projects can be understood, and therefore taken into account during planning. That requirement is reasonable and causes no problems for the *Amici*. Indeed they encourage such environmental planning. However, no amount of foresight could have predicted the need for a provincial impact statement for the Northern Great Plains, especially in view of the Proposed Federal Coal Leasing Program and Eastern Powder River Basin Impact Statements. Decisions on sources of fuel and energy must be made years in advance in order to insure their availability. In allowing private individuals to determine the boundaries for provincial impact statements the court below has introduced a wild card into the deck which could appear at any time,

without warning, to prevent these publicly and consumer-owned utilities, as well as investor-owned utilities, from providing electric power to the people they serve.

II. REASONS FOR GRANTING THE WRIT

The Federal-Petitioners and the Intervenor-Petitioners presented four basic reasons for granting the writ. The *Amici* fully concur with the reasons presented by the Petitioners, namely: (1) this case is an extremely important interpretation of the National Environmental Policy Act¹; (2) the decision below is in conflict with the decision of this Court in *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, No. 73-1966 (June 24, 1975) (SCRAP II); (3) the decision below is in conflict with five recent Courts of Appeals decisions in the Fifth, Ninth, and Tenth Circuits²; and (4) the decision below was incorrect in not affirming the judgment of the District Court that since there was no existing or proposed regional federal program for the development of coal in the area named in the complaint, therefore, a regional environmental impact statement was not required by the National Environmental Policy Act.

¹ 42 U.S.C. 4321, 4331-4335, 4341-4347.

² *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir.), *affirming* 356 F. Supp. 131 (N.D. Cal. 1973); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

III. CONCLUSION

For the foregoing reasons and those presented in the petitions of the Federal and Intervening Petitioners the petition for writ of certiorari should be granted.

Respectfully submitted,

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Washington, D.C. 20036

Attorney for Amici Curiae

Date: October 17, 1975

Supreme Court, U. S.

FILED

FEB 27 1976

MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE
INTERIOR, ET AL.,

Petitioners

—v.—

SIERRA CLUB, ET AL.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,

Petitioners

—v.—

SIERRA CLUB, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED
OCTOBER 9 AND 10, 1975
CERTIORARI GRANTED JANUARY 12, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE
INTERIOR, ET AL.,

Petitioners

—v.—

SIERRA CLUB, ET AL.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,

Petitioners

—v.—

SIERRA CLUB, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RELEVANT DISTRICT COURT DOCKET ENTRIES

DATE	CIVIL DOCKET
1973	
June 13	Complaint and Preliminary Interrogatories by Plaintiffs.
July 18	Answers by defendants to plaintiffs' preliminary interrogatories; c/m 7/18/73.
August 2	Answer of defendant #1 to interrogatories; exhibit A and B and C; c/m 8/2/73.
Sept. 4	Motion of plaintiffs for summary judgment; statement; P & A. table of contents memorandum; exhibits A through K. c/m 8-31.
Sept. 12	Answer of Intervenor Cities Service Gas Co. to complaint. app of Harold L. Talisman.
Sept. 20	Answer of Westmoreland Resources, intervening deft. to complaint. app of Theodore Voorhees. c/m 9-20.
Sept. 25	Answer to defts. to complaint. c/m 9-24.
Oct. 18	Supplemental answers of deft. #1 to pltfs' interrogatories. c/m 10-18.
Oct. 19	Motion of Westmoreland Resources, intervening deft. for partial summary judgment; statements; P & A table of contents; table of cases. c/m 10-19 affidavits (4) exhibit A & B.
Oct. 24	Copy of motion of The Crow Tribe of Indians, intervening deft. for partial summary judgment; P&A. c/m 10-24.
Oct. 31	Motion of defts. for summary judgment; exhibits 1 & 2; 1 through IX; 3, 4, & 5. P & A in support of motion and in opposition to pltfs motion for summary judgment; statement; opposition to pltfs statement of material facts c/m 10-31
Oct. 31	Motion of intervening defts for summary judgment; statements (2); P&A's; Exhibit A, B, C, D; affidavit, Exhibit A; c/s 10-31-73.

DATE CIVIL DOCKET

1973

- Oct. 31 Motion of Kerr-McGee Corporation for partial summary judgment; P & A's; affidavits (3); c/m 10-31-73.
- Nov. 2 Motion of Intervenor deft's for judgment on the pleadings. c/s 11/2.
- Feb. 14 Memorandum Opinion (N) Parker, J.
- Feb. 14 Judgment denying pl'tfs. motion for summary judgment; granting motion of the federal defts. for summary judgment and granting motions of the intervening defts. for summary judgment and for judgment on the pleadings. Defts. recover their costs. (N) Parker, J.
- Feb. 21 Motion of pl'tfs. for reconsideration and to amend judgment; P & A's; c/m 2/21/74.
- March 14 Order denying motion of pl'tfs. for reconsideration and to amend judgment entered on 2/14/74. (N) Parker, J.
- March 19 Notice of appeal by plaintiffs from judgment of 2/14/74 and from denial of reconsideration on March 14, 1974. Copies mailed to all attorneys of record. \$5.00 deposit by Terris.

COURT OF APPEALS DOCKET ENTRIES

- 4-12-74 Respondents' filed motion for injunction pending appeal and expedited hearing.
- 4-22-74 Intervenor-petitioners filed opposition to motion for injunction pending appeal and expedited hearing.
- 4-23-74 Federal petitioners filed opposition to motion for injunction pending appeal.
- 6-17-74 Per curiam order granting motion for expedited appeal, denying injunction pending appeal and urging restraint.
- 10-15-74 Per curiam order sua sponte remanded to District Court for further evidentiary hearing on special matters.
- 11-19-74 Respondents' filed motion for expedited consideration and for limited injunction pending appeal.
- 11-22-74 Intervening petitioners' filed opposition to motion for limited injunction pending appeal.
- 11-25-74 District Court (Honorable Barrington Parker) filed response to remand and supplemental findings.
- 11-26-74 Federal petitioners' opposition to motion for limited injunction pending appeal.
- 1-3-75 Per curiam order granting respondents' motion for limited injunction pending appeal; Judge Mackinnon dissents.
- 6-16-75 Opinion for court filed by Circuit Judge Wright; Dissenting opinion filed by Circuit Judge Mackinnon.
- 6-16-75 Judgment reversing and remanding to the District Court.
- 10-9-75 Respondents' motion to modify injunction by including Amax mining plan.
- 10-9-75 Petition for certiorari filed by federal petitioners in No. 75-552.
- 10-10-75 Petition for certiorari filed by intervenor-petitioners in No. 75-561.

COURT OF APPEALS DOCKET ENTRIES

- 10-24-75 Motion by Amax, Inc., for leave to file motion to intervene.
- 10-29-75 Intervenor-petitioner, Oklahoma Gas and Electric Company filed opposition to motion to modify injunction.
- 11-29-75 Federal petitioners filed opposition to motion to modify injunction and cross-motion to dissolve injunction.
- 10-30-75 Intervenor-petitioners filed motion to dissolve temporary injunction.
- 11-7-75 Per curiam order remanding respondents' motion to modify injunction to district court; cross-motions of federal and intervenor-petitioners to dissolve injunction denied.
- 11-4-75 Order of District Court (Honorable June Green) denied respondents' motion to enjoin approval of Amax mining plan, but limiting approval to 2 years.
- 11-7-75 Per curiam order granting motion of Amex, Inc., to intervene.
- 11-14-75 Federal petitioners' filed motion with Chief Justice to dissolve Eastern Powder River Injunction pending disposition for petitions for certiorari.
- 1-12-76 Petitions for certiorari in Nos. 75-552 and 75-561 granted; cases consolidated; stay of injunction pending final disposition of cases granted.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1132-

[Filed June 13, 19]

SIERRA CLUB, 1050 Mills Tower, 220 Bush Street, San Francisco, California 94104; NATIONAL WILDLIFE FEDERATION, 1412 16th Street N.W., Washington, D.C. 20036; NORTHERN PLAINS RESOURCE COUNCIL, 421 Stapleton Building, Billings, Montana 59101; LEAGUE OF WOMEN VOTERS OF MONTANA, 6630 Siesta Drive, Missoula, Montana 59801; MONTANA WILDERNESS ASSOCIATION, Route 1, Box 1401, Hamilton, Montana 59840; MONTANA LEAGUE OF CONSERVATION VOTERS, Box 80, Missoula, Montana 59801; LEAGUE OF WOMEN VOTERS OF SOUTH DAKOTA, P.O. Box 1989, Rapid City, South Dakota 57701, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary of the United States Department of Interior; BURTON W. SILCOCK, Director of the Bureau of Land Management of the Department of Interior; MARVIN FRANKLIN, Assistant Secretary for Indian Affairs of the Department of Interior; GILBERT G. STAMM, Commissioner of the Bureau of Reclamation of the Department of Interior; VINCENT E. MCKELVEY, Director of the U.S. Geological Survey of the Department of Interior; EARL L. BUTZ, Secretary of the United States Department of Agriculture; JOHN R. MCGUIRE, Chief of the Forest Service of the Department of Agriculture; HOWARD H. CALLAWAY, Secretary of the United States Department of the Army; LT. GEN. F. J. CLARKE, Chief of the Army Corps of Engineers, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF AND MANDAMUS

INTRODUCTION

1. This case involves the massive development of north-eastern Wyoming, eastern Montana, western North Dakota and western South Dakota. Based on the most extensive coal reserves in the world, strip mines, power plants, coal gasification and liquefaction plants, railroads, aqueducts, transmission lines, and new cities and towns have been begun or are expected to be built during the next few years. Federal agencies have already made many decisions concerning this development and will make many more decisions to enter into coal leases, to approve mining plans, to enter into options or contracts for water from federal reservoirs, to permit diversion of water from or placement of structures in navigable waterways, to grant permits for transmission lines to cross navigable waters, and to grant rights-of-way across federal lands. No comprehensive environmental impact statement or inter-disciplinary study has been made of the entire development or of any single federal action taken as part of it. This complaint alleges that defendants' proposed actions which will permit significant coal development to occur without preparation of a comprehensive environmental statement and interdisciplinary study violate the National Environmental Policy Act.

JURISDICTION

2. The jurisdiction of this Court is based upon the Administrative Procedure Act, 5 U.S.C. 701-706, which provides for judicial review of actions of federal agencies; upon 28 U.S.C. 1331(a), which gives the district courts jurisdiction over cases involving federal questions in which the amount in controversy exceeds \$10,000; and upon 28 U.S.C. 1361, which gives the district courts jurisdiction over actions in the nature of mandamus. The matter in controversy exceeds \$10,000, exclusive of interest, costs and attorneys' fees.

PARTIES

Plaintiffs

3. The SIERRA CLUB is a non-profit California corporation with an office in the District of Columbia. It was founded in 1892 and has 140,000 members organized into 42 chapters throughout the United States. The Sierra Club has been devoted to the protection of the Nation's natural resources from its inception. The Club maintains its Northern Great Plains Office in Dubois, Wyoming. The Northern Rockies Chapter of the Sierra Club has approximately 1,000 members in the States of Montana, Idaho, and a portion of Washington. The Rocky Mountain Chapter of the Sierra Club has approximately 3,000 members in Wyoming, North Dakota, South Dakota, Nebraska, Kansas and Colorado. Both chapters of the Club have been actively engaged in submitting comments and statements to, and obtaining information from, defendants concerning the North Central Power Study, the Northern Great Plains Resources Programs, proposed coal and water permits and leases, and other developments connected with exploitation of the coal resources of the Northern Great Plains area. In addition, various members of both chapters have participated in tours of mining areas, have organized a meeting of Wyoming's mining legislation, have spoken at numerous meetings on coal mining and reclamation, and most recently have formed the Northern Plains Regional Conservation Committee to work specifically on the coal, power and water problems of the region.

4. The NATIONAL WILDLIFE FEDERATION ("NWF") is a nonprofit corporation organized under the laws of the District of Columbia in 1939. NWF is a nationwide conservation organization dedicated to the restoration, wise use and perpetuation of the natural resources of North America. The individual members of clubs affiliated with NWF, together with NWF's individual associate members, total approximately two million persons. NWF has Affiliate Member Organizations

in Montana, North Dakota, South Dakota and Wyoming, which have approximately 17,000 members. NWF also has over 8,000 individual members in these states.

5. The NORTHERN PLAINS RESOURCE COUNCIL is a nonprofit organization with its principal office in Billings, Montana. It has 500 members, primarily ranchers, farmers and families in Montana, North Dakota, and Wyoming. The Council is principally concerned with protecting the environment and life style of the area from harm caused by strip mining and other effects of coal development. Its officers, members, and staff have participated in numerous meetings and testified before legislative bodies and have lobbied before the Montana legislature and United States Congress. It publishes a newsletter relating to coal development.

6. The LEAGUE OF WOMEN VOTERS OF MONTANA, whose headquarters are in Missoula, Montana, has approximately 425 members. It has worked to enforce sound reclamation practices relating to strip mining, testified for strong air and water quality legislation, and organized a coal forum for legislators and citizens concerned with coal development.

7. The MONTANA WILDERNESS ASSOCIATION is a Montana organization with over 750 members. It has supported efforts to abolish strip mining or as an alternative, to require effective reclamation.

8. The MONTANA LEAGUE OF CONSERVATION VOTERS is a Montana organization with over 100 members. It has actively worked to protect the environment from the harm which will be produced by strip mining including support for bills providing for the abolition of strip mining, for a moratorium, or for effective reclamation.

9. The LEAGUE OF WOMAN VOTERS OF SOUTH DAKOTA has 368 members. The League's headquarters is in Rapid City, South Dakota, adjoining the region of South Dakota's coal development. One of its principal purposes is to protect the environment of South Dakota by promoting intelligent use of water resources, improving air and water quality, and promoting sound land-use policies.

10. Plaintiff organizations sue on behalf of their members as well as themselves. Many of their citizens and members are residents and land owners in the Northern Great Plains region. Those who are ranchers and farmers are threatened by the destruction of their land by strip mining, by the diversion of needed water, by the threat of pollution to ground and stream water, and by the harm to animals, crops, and vegetation from air pollution. Those who operate or are employed in recreational industries are threatened by the loss of land needed by wild animals, by the threat to these animals from air and water pollution, by destruction of grazing land, by the harm to fish by diversion of water, and by pollution in streams and rivers and by vastly increased population. All those who are residents of the area or visitors to it are threatened by being forced to breath polluted air, by loss of recreational opportunities, and by the esthetic damage from constructing power plants, transmission lines, railroads, highways, and towns and cities.

Defendants

11. ROGERS C. B. MORTON is Secretary of the United States Department of Interior. He has the authority and responsibility under 25 U.S.C. 320 *et seq.*, to lease lands in any Indian reservation for rights-of-way; under 25 U.S.C. 396 *et seq.* to lease lands in any Indian reservation for mining purposes; under 30 U.S.C. 181 *et seq.*, to issue mineral prospecting permits and mining leases on federally owned lands; under 30 U.S.C. 351 *et seq.*, to lease mineral deposits within acquired lands; under 30 U.S.C. 541 *et seq.*, to lease deposits of lignite containing valuable source materials; under 43 U.S.C. 299, to dispose of mineral deposits reserved by the federal government beneath patented lands; under 43 U.S.C. 934 *et seq.*, 956-959, and 961, to issue rights-of-way for aqueducts, railroads, and transmission lines through federally owned lands; under 43 U.S.C. 389 and 541, to enter into contracts for water-rights and to issue water-right certificates; under 43 U.S.C. 440, to regulate the use of water for reclamation projects; and under

30 U.S.C. 189 and 359, to regulate the development of publically-owned coal lands and deposits.

12. BURTON W. SILCOCK is Director of the Bureau of Land Management of the Department of Interior. He has the authority and responsibility under 43 C.F.R. Part 23 to regulate surface exploration, mining and reclamation under permits, leases or contracts issued by the federal government; under 43 C.F.R. Subparts 2842 and 2850 to regulate the granting of rights-of-way for railroads, aqueducts and transmission lines through federally owned lands; under 43 C.F.R. Parts 2800, 3500 and Subpart 3814 to formulate, direct and supervise the execution of policies, programs and activities involving the issuance of coal prospecting permits, coal mining leases, and rights-of-way on federally owned and managed lands as well as on patented lands where the federal government has reserved the mineral rights beneath the surface; and under 43 C.F.R. Part 3720 to regulate the location and mining of valuable source materials located in lignite deposits on public lands.

13. MARVIN FRANKLIN is Assistant Secretary for Indian Affairs of the Department of Interior. He has the authority and responsibility under 25 C.F.R. Parts 171, 172, and 177 to formulate, direct and supervise and the execution of policies, programs and activities involving the issuance of coal prospecting permits, coal mining leases and rights-of-way on lands within Indian reservations.

14. GILBERT G. STAMM is Commissioner of the Bureau of Reclamation of the Department of Interior. He has authority and responsibility under 43 C.F.R. Part 230 to formulate, direct and supervise the execution of policies, programs and activities involving the issuance of water-right certificates; and under 33 C.F.R. Subparts 208.40, 208.48, 208.49, 208.52 and 208.53 to regulate the discharge or release of waters from certain reservoirs in Wyoming and Montana.

15. VINCENT E. McKELVEY is Director of the U.S. Geological Survey of the Department of Interior. He has the authority and responsibility under 30 C.F.R.

Part 211 to formulate, direct and supervise the execution of policies, programs and activities involving the orderly and efficient development of federally owned coal lands and deposits under lease, permit or license; and under 43 C.F.R. Part 3720 to regulate the mining of lignite containing valuable source materials.

16. EARL L. BUTZ is the Secretary of the United States Department of Agriculture. He has the authority and responsibility under 16 U.S.C. 471 to administer the National Forests and under 16 U.S.C. 522-525 to grant easements for rights-of-way through national forests for various purposes.

17. JOHN R. McGUIRE is Chief of the Forest Service of the Department of Agriculture. He has the authority and responsibility under 36 C.F.R. Subparts 251.1 (c) (3) and 251.50-251.65 to formulate, direct and supervise the execution of policies and programs involving the issuance of special use permits, easements, or rights-of-way through the National Forests.

18. HOWARD H. CALLAWAY is Secretary of the United States Department of the Army. He has the authority and responsibility under 33 U.S.C. 1 and 708-709 to administer the nation's navigable waters and to regulate the discharge or release of waters from certain reservoirs.

19. LT. GEN. F.J. CLARKE is Chief of the Army Corps of Engineers. He has the authority and responsibility under 33 C.F.R. Subparts 209.120 and 209.200 to formulate, direct and supervise the execution of policies and programs regulating the use of waters from the Nation's navigable waters, the placement of any structures in such waters, and the grant of permits for transmission lines to cross these waters.

FACTS

20. The Northern Great Plains region involved in this lawsuit includes northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota.

This region is largely vast, open plains, flat-topped buttes, long narrow divides, ridges, and badland topography. The chief vegetation is grass with small stands of cottonwood and brush along the larger streams. The region has a semiarid climate with only fourteen inches of average annual precipitation. Its economy is chiefly agrarian, based on large farms and ranches. There is little industry and a very low population, averaging about 1.4 persons per square mile. Some sections are serviced by highways and secondary roads and the Burlington-Northern Railroad crosses the area at several points, but much of the area is isolated from main transportation systems. Most of the present population derives its livelihood from ranching on the rangelands and farming in the river valleys.

21. This area contains vast coal reserves. The coal, known as the Fort Union formation, is the largest known coal basin in the world. Its total reserves have been estimated at 1.3 trillion tons which is approximately 40 percent of the coal in the entire United States. 34 billion tons of this coal lie close enough to the surface to be extracted by strip mining, this amount constituting approximately 47 percent of the strippable coal in the United States. The thick coal seams, small amount of overburden, and low sulfur content make strip mining extremely profitable. Within the last few years, tremendous interest has developed in exploiting the region's coal in constructing the electric powerplants, aqueducts, transmission lines, gasification and liquefaction plants, railroads, and new towns and cities which will be required for such development.

22. The North Central Power Study, prepared jointly by the Department of Interior and the utility companies in the area, projected the construction of mine-mouth, coal-burning electric power plants with a capacity of 53,000 to 197,000 megawatts. Most of these plants will have individual capacities of 5,000 or 10,000 megawatts, in comparison to only 2,000 megawatts at the Four Corners power plant in New Mexico. A total capacity of 197,000 megawatts would be greater than the total electrical energy capacity of any country in the world except

the United States and the Soviet Union. The Study further proposed a vast network of ultra-high voltage transmission lines reaching as far away as Portland, Oregon, and Seattle, Washington, in the Far West and St. Louis, Missouri, and Minneapolis-St. Paul, Minnesota, in the Middle West. 4,800 square miles of right-of-way would be required for this transmission line network.

23. The Bureau of Reclamation estimates that up to 2.6 million acre feet of water will be needed for the coal development in Wyoming and Montana alone. The electric power plants will require 855,000 acre feet of water annually for every 50,000 megawatts of operating capacity. Large amounts of additional water will be needed for other elements of the coal development. In order to obtain much larger quantities of water in this semiarid region, the "Appraisal Report on Montana-Wyoming Aqueducts" of the Bureau of Reclamation of the Department of Interior has proposed the construction of an extensive system of large aqueducts, 36 to 144 inches in diameter and extending from 20 to 200 miles. For example, one major proposal is for an aqueduct to transport water from the Green River in the Colorado River Basin to the Powder River in the Missouri River Basin. New dams and reservoirs have also been proposed in order to ensure an adequate water supply during dry periods.

24. Plans and proposals exist for at least 25 coal gasification plants which, using large amounts of water, will convert coal to gas to be piped to the Middle West; for slurry pipelines, which will use large amounts of water, to pipe small pieces of coal; for railroads, which will haul out the coal in its present form; and for new towns and cities to house the more than one-half million people who are expected to come to the area within the next twenty-five years.

25. The various aspects of these proposals for exploiting the area's coal reserves are closely interrelated. All the plans and proposals depend on strip mining large quantities of coal. The coal can be converted into electricity, gas, liquid fuel, or petrochemicals by a variety of processes at mine-mouth plants, thus requiring electric transmission lines, pipelines, or other methods of trans-

porting these products to distant markets. Alternatively, some or all of the excavated coal could be transported by trains or slurry pipelines to generating plants located near the points where the electricity will be used. Most of these proposals for exploiting the area's coal will require tremendous quantities of water, thus necessitating the construction of aqueducts, dams, and reservoirs. The large increase in population needed to construct and service these projects will require housing, schools, police and fire protection, sewage treatment, shopping facilities, transportation, communications, cultural and recreational resources, and even entire new cities.

26. This development has already begun. These activities include, but are not limited to, the following:

- (a) Leases and permits for coal exploration, mining and development have been issued by the Bureau of Land Management on over 320,000 acres of land, by the Bureau of Indian Affairs on over 516,000 acres of land, by the States of Wyoming and Montana on over 490,000 acres, and on vast but unknown acreage held by the Burlington-Northern Railroad and other private owners;
- (b) Large strip mines are already operating in northeastern Wyoming and southeastern Montana and new strip mines have been announced;
- (c) Two coal-burning electric power plants, each with a 350 megawatt generating capacity, are already under construction by Montana Power and Light Co. at Colstrip Montana; two more plants, each of a 750 megawatt capacity are planned there; construction has begun on transmission lines to Billings, Montana from Colstrip; and the same company has claimed rights to more than sufficient water from the Yellowstone River for all four plants;
- (d) New power plants of 200 to 300 and 1200 megawatts respectively have been announced in 1973 for Campbell and Johnson Counties, Wyoming, and four large plants are planned for North Dakota;

- (e) In March 1973, the Cities Service Gas Co. and the Northern Natural Gas Co. announced plans for four coal gasification plants in northern Wyoming and southeastern Montana and for a 700-mile gas pipeline;
- (f) Proposals have been made to the Northern Cheyenne tribe in Montana for several coal gasification plants;
- (g) The Michigan-Wisconsin Pipeline Company has asked the State of North Dakota for enough water—375,000 acre feet—for 22 huge 250 million cubic feet per day coal gasification plants;
- (h) Coal and electric power companies have obtained options from the Bureau of Reclamation for approximately 700,000 acre feet of water from the Bighorn Lake and Boysen Reservoir and private companies have requested almost 1,500,000 more acre feet;
- (i) The State of Wyoming has announced plans to purchase from the Bureau of Reclamation 60,000 acre feet of water from the Green River in western Wyoming, to be transported at least in part by aqueduct to northeastern Wyoming; and
- (j) The Burlington-Northern Railway Co. has begun building a spur-line into the coal mining area at Sarpy Creek, Montana, and has applied to the Interstate Commerce Commission for a railroad of 126 miles from Douglas to Gillette, Wyoming, the longest new railroad line to be built anywhere in the United States in over forty years.

27. The environmental effects of this development will be enormous:

- (a) Over 30 square miles of land will be strip mined each year, for a total of 900 square miles that will be stripped over the estimated thirty-year life of the power plants planned for the area.

As a result of the semiarid climate and thin topsoil, little if any land which has been strip mined in this area has ever been successfully reclaimed. It is therefore likely that hundreds of square miles of land will be permanently destroyed. Strip mining also produces considerable danger that toxic materials will pollute the area's groundwater;

- (b) The operation of huge coal-burning electric power plants will cause massive deterioration of air quality through the region and in nearby areas up to several hundreds of miles away. At present, the air there is almost entirely free of man-produced pollution. The operation of power plants with a capacity of 53,000 megawatts (which is only one-quarter of the capacity ultimately projected by the North Central Power Study) will produce emissions of 6,890 tons of sulfur oxides per year, 4,000 tons of nitrogen oxides per year, and 1,144 tons of particulates per year, representing many times the emissions of New York City and Los Angeles combined. Serious health dangers may result from fluorides, radioactive substances and other trace elements in the coal. The houses, other buildings, industry and automobiles needed by the new residents of the area will further significantly degrade the area's air quality;
- (c) The development of the area will significantly increase water pollution both in the region and in rivers which flow into other areas. This increase will be caused by the fly ash and slag from the power plants, by the mining spoils which will leach into the water, by diversion of waters that are needed to dilute pollution levels in rivers and streams, and by the additional sewage resulting from urbanization of the area;
- (d) The large-scale use of water will seriously affect the use of water for other purposes. Even today, there is not sufficient water in the Yellowstone

River in low-water years for the farming and ranching which are now the chief sources of livelihood in the area. Major additional uses for electric power and coal gasification and liquefaction plants, for reclamation of strip mined areas, and for large numbers of additional people will result in the Yellowstone River being dry in low-water years;

- (e) The abundant wildlife in the area is threatened by the destruction of grazing land through strip mining, by the large-scale use of already scarce water, by the construction of aqueducts, transmission lines, pipelines, and railroads which will obstruct the natural movement of wildlife, and by the air, water, and noise pollution which will inevitably result. The additional water pollution and substantial depletion of water in the Yellowstone River and other waterways in the area will also seriously affect fish in them;
- (f) The majestic unspoiled vistas of rangelands, buttes and mesas will be permanently changed. This beauty will be replaced by strip mines, huge electric power plants, gasification and liquefaction plants, railroads, transmission lines and new cities and towns. These activities will occupy tens of thousands of square miles of land that are now virtually deserted.
- (g) In total, a beautiful, largely uninhabited area will become a major industrial complex. The effect will be a massive change in the environment of a whole region. This area could not be restored to its present environment for many generations.

28. Numerous possible alternatives exist relating to the exploitation and development of these coal resources. The coal could be left completely untouched in order to preserve the region's present rural character or the development could be limited in scope. If the coal is developed, this development could be accomplished in a variety of

ways designed to reduce significantly the adverse environmental effects. Coal could be mined underground to prevent the destruction of hundreds of square miles of land by strip mining. Even if some strip mining were permitted, it could still be prohibited in certain areas, such as hills, where reclamation has been shown to be particularly difficult. Coal companies could be required to prove in advance of mining that reclamation would be successful. The coal could be transported elsewhere by railroad or slurry pipeline so that air pollution would not occur within the area as a result of mine-mouth power plants. Alternatively, the coal could be converted to gas or liquid fuel which would be transported for use elsewhere or used to produce electricity in the area. If electric power plants were built in the area, they could be required to use the most effective emission controls and to place transmission lines underground. If the coal is to be consumed in the area, electrical generation, gasification and liquefaction methods which would conserve water could be required. Urban planning, zoning laws, and other legislative devices could be adopted in order to produce towns and cities which avoid ugly urban sprawl.

29. A careful and comprehensive study of the available alternatives prior to development of the area's coal reserves would provide protection for the environment before permanent harm results. Such a study could consider among other issues:

- (a) Whether only underground mining should be permitted. Once large-scale strip mining is allowed on a substantial scale, the additional cost of underground mining will prevent the latter method from being competitive;
- (b) Which land can be best reclaimed after strip mining. Coal companies will naturally choose lands to mine which provide the best financial return rather than those which can be most easily reclaimed. Once the mines are opened, they will almost certainly continue to operate;
- (c) How the coal can produce the maximum economic benefit with minimum harm to the en-

vironment. This problem will require determinations as to whether the coal should be transported out of the region by railroad or pipeline, burned for electric power at the mine-mouth generating plants, gasified, or liquified;

- (d) How much additional air pollution can be permitted and what kinds of industrial plants will maximize productivity within those limits. Planning is needed in order to obtain the maximum benefit from whatever level of pollution is permitted;
- (e) What controls should be required for air-pollution emissions so that the initial plants do not cause so much air pollution that no further development may be allowed;
- (f) How the limited water resources can be best used. If available water is used wastefully, inadequate water may be available for other agricultural, recreational, and industrial purposes and the detrimental effects on the environment will be increased;
- (g) Whether common use of utility corridors should be required for transmission lines, pipelines, aqueducts and railroads in order to minimize the use of land and interference with aesthetic values;
- (h) What land-use planning should be prescribed in order to reduce the amount of land needed for industry and cities and to minimize the aesthetic and other environmental damage from development of the area.

30. The development of the area's large coal reserves raises many serious environmental questions which have not yet been thoroughly studied and which require answers before permanent environmental harm is produced. These unanswered questions include, *inter alia*:

- (a) The determination whether any reclamation of spoils from strip mines is possible in this re-

gion, the most effective methods if any are feasible, and their costs;

- (b) The kinds of toxic materials produced by strip mining and power plant emissions, the amounts which are toxic, the amount of radioactivity produced, and the effect of toxic materials and radioactivity on human beings and the environment;
- (c) The kinds and amounts of air pollution produced, their impact on the region's ecosystems, the pollution controls that should be used, and the effectiveness of these controls;
- (d) The pollution of underground water sources and streams which will result from power plants and other industry, the kinds of water pollution controls that are needed, and the effectiveness of these controls;
- (e) The effect on groundwater resources from mining since the coal beds are presently aquifers;
- (f) The effect on regional weather patterns from increased air pollution, more population, and changes in land use;
- (g) The effect on the region's livestock and wildlife, including endangered species, from the mining, the air and water pollution, the altered rangelands and the increased human population; and
- (h) The effect of an expanded population on air and water pollution, recreational resources, agricultural development, transportation and communication systems, and governmental services.

31. Defendants have already taken extremely important actions with regard to development of the coal reserves in the Northern Great Plains region. These actions include issuing coal prospecting permits and mining leases on over 836,000 acres of land and entering into options for the sale of 685,000 acre feet of water from Bighorn Lake and Boysen Reservoir.

32. The decisions that will be made by defendants in the future will be critically important concerning the degree and kind of development in the region. The federal government owns approximately 54 million acres of land with coal reserves in the Northern Great Plains region and has mineral rights to almost 75 percent of all the region's coal. The Bureau of Land Management and the Bureau of Indian Affairs have entered into or approved coal leases for thousands of acres of land in the region and these agencies, as well as the Geological Survey, have continuing powers over reclamation methods which the lessees employ on these lands. These same agencies have authority to issue additional coal prospecting permits and mining leases and to impose reclamation requirements for lands mined under the terms of those leases. The Bureau of Reclamation has 67,000 additional acre feet of water for sale from Bighorn Lake and Boysen Reservoir and plans to sell additional water from the Green River and other rivers for use in the area. The Corps of Engineers has authority over the taking of waters from the Yellowstone and other navigable waterways, the placement of structures within such rivers to divert this water, and the extension of transmission lines across navigable waters. The Bureau of Land Management, the Bureau of Indian Affairs, and the Forest Service have authority to grant right-of-way permits for transmission lines, pipelines, aqueducts or railroads over federally owned lands. Many of these decisions and actions are expected in the immediate future.

33. The United States has treated the coal development of this region as requiring comprehensive planning. The Department of Interior, together with the utility companies, made a preliminary study of the overall development, particularly relating to electric-power generation and transmission, in Phase I of the North Central Power Study which was completed in 1972. The Bureau of Reclamation made a preliminary investigation of the overall development, particularly with relation to the availability of water, in the Appraisal Report of Montana-Wyoming Aqueducts, which was completed in 1972.

A number of federal agencies have begun work on the Northern Great Plains Resources Program, which purports to be a comprehensive study of coal development, including its effect in the environment.

34. None of the Federal studies which have been completed have provided any substantial or detailed analysis of the environmental consequences of development in the region. No interdisciplinary or comprehensive studies have been prepared concerning this problem and no alternatives to the present coal development have been studied and developed. No environmental impact statement has been prepared or considered concerning any individual federal acts relating to the coal development in the Northern Great Plains region or concerning the development in the region as a whole.

35. The State of Montana has likewise considered development of the area as a unified whole in the "First Annual Report" of the Montana Environmental Quality Council (1972) and the "Coal Situation Report" of the Montana Coal Task Force (1973). The State of Wyoming has begun a comprehensive study of coal development in the northeastern part of the State, and the State of North Dakota has begun a comprehensive study of such development in its western portion.

36. Federal officials have recognized the need for a comprehensive environmental-impact statement on the development of the Northern Great Plains region. William D. Ruckelshaus, Administrator of the Environmental Protection Agency, wrote Secretary of Agriculture Butz and Secretary of Interior Morton (March 24, 1972):

Environmental impact statements prepared on project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and the spirit of the National Environmental Policy Act.

The Secretary of Agriculture replied (Letter to the Administrator, Environmental Protection Agency, May 2, 1972):

We agree that a comprehensive, systematic, and interdisciplinary study of all aspects of the development and use of our coal resource is needed.

This position has been agreed to by the Secretary of Interior, Secretary of Agriculture, Chief of the Forest Service and other high federal officials.

37. The actions described in paragraph 32 above will result in severe harm to air quality, water quality, land, wildlife, aesthetics, and other important aspects of the environment of the Northern Great Plains region. If further actions are taken without preparation and consideration of a comprehensive environmental impact statement, significant elements of the region's environment will be needlessly and permanently destroyed. Therefore, unless defendants are enjoined from taking further actions without preparation of a comprehensive environmental-impact statement, plaintiffs and the public will suffer immediate and irreparable injury from the actions of defendants. Plaintiffs have no adequate remedy at law.

CLAIMS

First Claim

38. The National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, requires that Federal agencies prepare an environmental-impact statement before taking any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The actions that defendants have taken and are expected to take concerning coal development in the Northern Great Plains region, as described in paragraphs 31 and 32 above, are plainly major Federal actions requiring preparation and consideration of an environmental-impact statement because individually, or at least cumulatively, they have an enormous impact on the region's environment.

39. The failure of defendants to prepare and consider a comprehensive environmental-impact statement concerning coal development in the Northern Great Plains region before issuing any coal prospecting permits or mining leases, approving any coal exploration or mining plans, entering into options or contracts for the sale of water, granting water rights, delivering water under existing options or contracts, approving diversion of water from or placement of structures in navigable waterways, granting permits for transmission lines to cross navigable waters, granting right-of-way permits for transmission lines, pipelines, aqueducts or railroads, or taking any other actions concerning coal development in the Northern Great Plains region violates the National Environmental Policy Act.

Second Claim

40. Section 102(2)(A) of NEPA, 42 U.S.C. 4332(2)(A), requires "all agencies of the Federal Government * * * [to] utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment." Section 102(2)(D), of NEPA, 42 U.S.C. 4332(2)(D), requires "all agencies of the Federal Government * * * [to] study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The failure of defendants to make systematic interdisciplinary studies of the Northern Great Plains region or to study, develop and describe appropriate alternatives before issuing any coal prospecting permits or mining leases, approving any coal exploration or mining plans, entering into options or contracts for the sale of water, granting water rights, delivering water from existing options or contracts, approving diversion of water from or placement of structures in navigable waterways, granting permits for transmission lines to cross navigable waters, granting right-of-way permits for transmission lines, pipelines, aqueducts, or railroads, or taking any other actions concerning coal development

in the Northern Great Plains region violates the National Environmental Policy Act.

RELIEF

WHEREFORE, plaintiffs pray that this Court:

1. Enter a declaratory judgment that the National Environmental Policy Act is violated if defendants issue any coal prospecting permits or mining leases, approve any coal exploration or mining plans, enter into options or contracts for the sale of water, grant water rights, deliver water under existing options or contracts, approve diversion of water from or placement of structures in navigable waterways, grant permits for transmission lines to cross navigable waters, grant right-of-way permits for transmission lines, pipelines, aqueducts or railroads, or take any other action involving or affecting coal development in the Northern Great Plains region without preparing a comprehensive environmental-impact statement and interdisciplinary studies of coal and coal-related development of the region which meet the requirements of the National Environmental Policy Act.

2. Enjoin defendants from issuing any coal prospecting permits or mining leases, approving any coal exploration or mining plans, entering into options or contracts for the sale of water, granting water rights, approving diversion of water from or placement of structures in navigable waterways, delivering water under existing options or contracts, granting right-of-way permits for transmission lines, pipelines, aqueducts or railroads, granting permits for transmission lines to cross navigable waters, or taking any other action involving or affecting coal development in the Northern Great Plains region without preparing a comprehensive environmental-impact statement and interdisciplinary studies of coal and coal-related development of the region which meet the requirements of the National Environmental Policy Act.

3. Order defendants, prior to issuing any coal prospecting permits or mining leases, approving any coal exploration or mining plans, entering into options or

contracts for the sale of water, granting water rights, delivering water under existing options or contracts, approving diversion of water from or placement of structures in navigable waterways, granting permits for transmission lines to cross navigable waters, granting right-of-way permits for transmission lines, pipelines, aqueducts or railroads, or taking any other action involving or affecting coal development in the Northern Great Plains region to prepare and consider a comprehensive environmental impact statement and to conduct interdisciplinary studies of all aspects of coal and coal-related development in the region which meet the requirements of the National Environmental Policy Act.

4. Determine that plaintiffs are entitled to payment of their attorneys' fees and costs; and

5. Provide such other relief to plaintiffs as the Court may deem just and appropriate.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER

For answer to the complaint, the defendants respectfully show:

First Defense

Answering the numbered paragraphs of the complaint, defendants show:

Introduction

1. Defendants alleged that the complaint fails to comply with Rule 8(a) of the Federal Rules of Civil Procedure in that it does not set forth a claim for relief containing a short and plain statement of the claim and it violates Rule 8(e)(1) in that each averment of the pleading is not simple, concise, and direct as required. Instead, the complaint consists of 24 pages containing 40 separately numbered paragraphs, virtually every one of which, contrary to the Federal Rules of Civil Procedure, is composed of multi-sentence averments of mixed factual allegations and argumentative conclusions. The complaint, in essence, presents a polemic diatribe founded upon argumentative statements of conjecture and mere speculation and properly should be stricken.

For the foregoing reasons, it is not feasible for the defendants to fully comply with Rule 8(b) by having all of the denials "fairly meet the substance of the averments denied". However, in the following answers, ad-

missions, denials, and affirmative allegations in confession and avoidance, defendants will endeavor to do so to the best of their ability.

Therefore, answering paragraph one, defendants admit that vast coal reserves exist in the States of Montana, Wyoming, North Dakota, and South Dakota, that federal agencies have made decisions concerning the prospecting and leasing of the coal reserves, and that development of those reserves of the type described in the second sentence of paragraph one has already occurred and may continue to occur. Defendants also admit that no single environmental impact statement relating to the entire development of the resources of all four states has been made. Defendants affirmatively allege that none is required. Each and every one of the remaining allegations in paragraph 1 is denied.

Jurisdiction

2. Defendants deny that the matter in controversy insofar as plaintiffs' interests are concerned exceeds \$10,000 as alleged. The remaining allegations in paragraph 2 constitute conclusions of law, which although requiring no answer, are denied.

3-9. The defendants are without information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 3-9 and those allegations are, therefore, denied.

10. The allegations in paragraph 10 constitute mixed averments and conclusions. These allegations and conclusions are denied.

Defendants

11. Rogers C. B. Morton is the Secretary of the Interior. The remaining allegations and conclusions are denied.

12. Denied. The Director of the Bureau of Land Management is not Burton W. Silcock but is Curt Burkland.

13. Marvin Franklin is Assistant to the Secretary for Indian Affairs. The remaining allegations and conclusions are denied.

14. Gilbert G. Stamm is Commissioner of the Bureau of Reclamation as alleged. The remaining allegations and conclusions are denied.

15. Vincent E. McKelvey is Director of the United States Geological Survey as alleged. The remaining allegations and conclusions are denied.

16-19. The individual defendants named are officers of the United States and serve in the capacity alleged. The remaining allegations and conclusions are denied.

Facts

20. Admitted.

21. Defendant admits that the area contains vast coal reserves within the Fort Union formation, that strippable deposits containing reserves of about 34 billion tons have been identified, of which 19 billion tons were considered to be economically recoverable, and that interest has developed in developing these coal reserves. The allegations not expressly admitted are denied.

22. Defendants affirmatively allege that the North Central Power study is merely a study. The findings and recommendations contained in that study are not considered to be the criteria for future Federal action. The North Central Power Study was divided into three phases. Phase I was to develop the costs for a general overall plan for the coordinated development of electric power supply in the North Central United States. Phase I was not a plan for development and contained no recommendations for development. Phase II required responses from interested utilities indicating each utility's interest in participating in the development followed by the revision of Phase I to reflect the interest in participation. Phase III was to relate to the implementation of contract arrangements and actual construction. Only Phase I of the study was completed. No utility indi-

cated an interest in further participation. Phases II and III of the study were therefore not undertaken.

Defendants affirmatively allege there is no present or proposed federal plan or program for coal development on federal lands in the region.

The North Central Power Study stated that the areas under study had proven coal reserves adequate to supply over 200,000 MW¹ of thermal generation; even though that would require only a small part of the total resource potential. However, an assumed development level of only 53,000 MW (50,000 thermal and 3,000 hydro) was studied as a reasonable ultimate development. For transportation study purposes, generation levels of 3,000 MW, 10,000 MW, 20,000 MW, 40,000 MW, and 43,000 MW were considered. Individual plants, sizes or locations were not determined by the study; however, it was necessary to make size and location assumptions to test technical feasibility.

The study considered several EHU² transmission lines to the eastern area bounded by St. Louis and Minneapolis. The study did not consider a transmission system to the far west such as Portland and Seattle area. The allegations of paragraph 22 not expressly admitted are denied.

23. Defendants affirmatively allege that the Appraisal Report on Montana-Wyoming Aqueducts prepared by the Bureau of Reclamation projected that water requirements of about 2.6 million acre feet may be required annually to meet a development level that may be attained in less than 30 years, and that a development of a generation capacity of 50,000 MW of thermal electric power could require cooling water of about 8,000 acre feet annually. The Appraisal Report on Montana-Wyoming Aqueducts was prepared in response to requests by energy fuel authorities and electric power

¹ MW = megawatt, 1 million watts or 1,000 kilowatts.

² Ultra-high voltage.

suppliers for information on the amount of water available from existing reservoirs and unregulated streams, as well as potential reservoirs, and the feasibility of moving large amounts of water from sources to points of possible use. The Appraisal Report on Montana-Wyoming Aqueducts did not propose or recommend construction of aqueducts, dams, or reservoirs, and concluded that additional studies of economic, social and environmental effects were required prior to development of firm plans. The allegations in paragraph 23 not expressly admitted are denied.

In further answer to the allegations in paragraph 23, the defendants allege that the Bureau of Reclamation, through a representative acting as chairman of the Task Force on Water, did estimate that 855,000 acre-feet of water would be required for cooling 50,000 MW of coal fired generation. The remainder of 2.6 million acre-feet was not an estimate, but an indication of probable use based on applications for water filed with the Bureau of Reclamation by energy and coal company officials. From continuing applications made to the Bureau, and with other applications for water made to the Corps, and the States of North Dakota and Montana, the indication for industrial water needs annually within the Fort Union Coal Region continues to increase. The Montana-Wyoming Aqueducts report was an appraisal of storage requirements and pipeline costs required to move water to various coal areas within the Region. It was an appraisal of the water situation and probable cost of water supplies. The report was not a plan and did not recommend any developments to be undertaken.

24. Denied.

25. In answer to the allegation in paragraph 25, defendants allege that there are no present federal proposals "for exploiting the area's coal reserves" as alleged. The remaining allegations in paragraph 25 are conjectures and suppositions. The defendants are aware of only one firm proposal for a gasification plant which

was submitted and rejected by the Indian owners of the lands involved. Those allegations not admitted are denied.

26(a). Defendants deny that the Bureau of Indian Affairs has issued leases and permits as alleged. That Bureau does not have authority to issue such leases or permits. Defendants affirmatively allege that such permits and leases as have been issued and which cover Indian lands are private documents negotiated by the respective tribes and merely approved or subject to approval by the Bureau of Indian Affairs. Defendants are without knowledge sufficient to form a belief as to the truth or falsity of allegations relating to Wyoming and Montana and the Burlington-Northern Railroad and other private owners. The other allegations relating to the Bureau of Land Management are admitted.

26(b). Defendants admit that strip mines are operating in northwest Wyoming and southeastern Montana. The allegations of 26(b) not expressly admitted are denied.

26(c). Defendants admit that two coal burning electric power plants are under construction near Colstrip, Montana. The allegations of 26(c) not expressly admitted are denied.

26(d)-(e). The defendants are without information sufficient to form a belief as to the truth or falsity of the allegations in these two paragraphs and they are, therefore, denied.

26(f). Defendants admit that one proposal has been made to the Northern Cheyenne Tribe but defendants assert that it was rejected.

26(g). Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

26(h). Defendants admit that contracts for the sale of 700,000 acre feet from the existing Bighorn Lake and Boysen Reservoir have been executed and that energy companies have indicated an interest in obtaining an additional 1.0 million acre feet annually. The

allegations of 26(h) not expressly admitted are denied.

26(i) Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

26(j). Defendants admit the allegations of 26(j) except that defendants are without information sufficient to form a belief as to the truth or falsity of the conclusion that the proposed line is the longest to be constructed in the United States in over 40 years.

27(a)-(g). Denied.

28. These argumentative allegations are denied. In further answer to the allegations in paragraph 28, defendants allege the underground mining of coal seams which are also amenable to development by surface mining methods would be very wasteful from a recovery standpoint, and would lead to unpredictable surface damage both as to time and magnitude. Permanent and potential damage to the surface by underground mining is a widely recognized fact. That type damage to the surface is not easily or readily reclaimed. Also, the hazards inherent with underground mining would be present. In paragraph 24 of the complaint, the use of slurry pipelines is decried. Yet, in paragraph 28, it is recommended by plaintiffs.

29. Denied.

30. Denied. Defendants allege that environmental impact statements covering applications involving major federal actions significantly affecting the quality of the human environment are being prepared and will be circulated, that defendants intent to prepare studies and environmental impact statements prior to taking any major federal action within their respective spheres of responsibility which will have a significant effect upon the human environment and that such statements will consider the environmental impacts resulting from those actions and the reasonable alternatives to the proposed actions.

31. Defendants admit that coal prospecting permits have already been issued and that options for sale of

water have been executed as alleged. The remaining allegations are denied.

32. Defendants admit that decisions concerning the degree and kind of development in the region will be made, that the Bureau of Land Management and the Bureau of Indian Affairs have issued or approved coal leases for thousands of acres of land in the region, that these agencies as well as the Geological Survey have continuing authority over reclamation and that the Bureau of Land Management has authority consistent with Departmental policy to issue additional coal prospecting permits, coal leases and other permits. The allegations of paragraph 32 not expressly admitted are denied.

33. The allegations in the first sentence of paragraph 33 constitute conclusions of law and are denied. As previously stated, the remaining allegations are generally admitted.

34. In answer to the allegations in paragraph 34, defendants allege that studies are being conducted and environmental impact statements are being prepared as a preliminary to any proposed major federal action which will have a significant impact upon the environment. The remaining allegations are denied.

35. Defendants admit that the State of Montana has considered development of the area as alleged in the first sentence of paragraph 35. Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations relating to Wyoming and North Dakota and those allegations are, therefore, denied.

36. Defendants admit the quotations from the letters of March 24, 1972, and May 2, 1972, as alleged. Defendants deny the remaining allegations in that paragraph and affirmatively allege that Northern Great Plains Resources Program Study has commenced.

37. Denied.

Claims

First Claim

38-39. Denied.

Second Claim

40. Denied.

41. Each and every allegation in paragraphs 1 through 40 which has not been admitted is denied.

Second Defense

For their second defense, defendants assert that the complaint fails to state a claim upon which relief can be granted.

Third Defense

The allegations in the complaint do not present a case or controversy but instead, seek an advisory judgment based upon conjectures and speculation. No justiciable issues are presented and the plaintiffs, therefore, are not entitled to the relief sought.

Fourth Defense

The complaint fails to allege that federal agency action has been taken or is threatened by the defendants. The Court, therefore, lacks jurisdiction of the matter under the Administrative Procedure Act.

Fifth Defense

The complaint does not allege that any defendant has failed or refused to perform a clear duty owed to plaintiffs. No facts, therefore, are asserted upon which to justify either mandamus or the issuance of an injunction as plaintiffs request.

Sixth Defense

Since defendants do not intend to take any major federal action which will have a significant impact upon

the environment without preparing and filing an environmental impact statement, this action is premature.

Seventh Defense

The allegations of the complaint do not present a reviewable issue with respect to lands owned by the Indians. Plaintiffs do not purport to represent the Indians and fail to claim or demonstrate that they or their members will be injured by activities occurring on lands belonging to the Indians. No justiciable issues are presented and the plaintiffs therefore are not entitled to relief sought with respect to Indian lands. Further, plaintiffs lack standing to question activities in connection with Indian lands.

WHEREFORE, defendants request that the action be dismissed and that judgment be entered in favor of the defendants.

Respectfully submitted,

/s/ Herbert Pittle
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

vs.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF INTERVENOR
PEABODY COAL COMPANY

For its answer, the intervenor, Peabody Coal Company, admits, denies and alleges as follows:

I

Admits that vast coal reserves exist in the states of Montana, Wyoming, North Dakota and South Dakota, and federal agencies have made many decisions concerning the development of such resources; denies the remaining allegations contained in Paragraph 1.

II

Denies that this Court has jurisdiction over this action. The allegations of the complaint do not allege a justiciable controversy, because plaintiffs seek an advisory judgment. Jurisdiction does not exist under the Administrative Procedure Act, 5 U.S.C. 701-706 because plaintiffs do not seek to review agency action. The complaint does not state a claim for an injunction or mandamus.

III

Is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 3, 4, 5, 6, 7, 8, 9, and 10.

IV

Admits the allegations of Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19.

V

Admits that the area described in the complaint as the Northern Great Plains region contains vast coal reserves, and that substantial interest exists in the development of such deposits and that a North Central Power Study and an Appraisal Report on Montana-Wyoming Aqueducts have been prepared. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraphs 20, 21, 22, 23, and 24.

VI

Denies the truth of the allegations of Paragraph 25.

VII

Admits that intervenor Peabody Coal Company has approximately two billion tons of coal under its control in Montana and almost one billion tons in Wyoming. In addition, intervenor has in excess of 300,000,000 tons of coal under its control in North Dakota. Intervenor also has two contracts with the United States Bureau of Reclamation for a total of \$80,000 acre feet of water to be delivered annually from the Yellowtail Reservoir, located in Wyoming and Montana, and available for industrial use in Montana. Intervenor operates its Big Sky Mine in Montana and ships coal therefrom by rail to the Midwest. Intervenor has committed substantial coal deposits to a gasification plant to be located on the Northern Cheyenne Indian Reservation in Montana and to another gasification plant to be located in Wyoming. Intervenor has also made proposals to provide coal to electric utilities around the country. Peabody Coal Company is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 26.

VIII

Denies the truth of the allegations of Paragraph 27.

IX

Admits that alternatives exist in the development of the coal resources of the region, and denies the truth of the remaining allegations of Paragraph 28.

X

Denies the truth of the allegations of Paragraph 29, and alleges that the Court is without jurisdiction to define the scope of the study sought by plaintiffs.

XI

Denies the truth of the allegations of Paragraph 30.

XII

Is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 31, 32, 33, 34, 35, and 36, except that the studies referred to in Paragraph 33 are underway or have been made.

XIII

Denies the truth of the allegations of Paragraphs 37, 38, 39, and 40.

XIV

FIRST AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint fails to state a claim upon which relief can be granted.

XV

SECOND AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint does not present a case of actual controversy but rather seeks an advisory judgment, and no justiciable issues are presented.

XVI

THIRD AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint does not allege that wrongful agency action has been taken, or is threatened, and the Court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

XVII

FOURTH AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint does not state that any defendant has failed or refused to perform a duty owed to plaintiffs, and no facts are alleged to justify mandamus or the issuance of an injunction.

HAVING FULLY DEFENDED, intervenor Peabody Coal Company prays that plaintiffs take nothing by their complaint, that intervenor recover its costs herein incurred, and that this Court grant intervenor such other and further relief as the Court deems just.

Date: July 16, 1973.

Respectfully submitted,

MARVIN O. YOUNG
Peabody Coal Company
301 North Memorial Drive
St. Louis, Missouri 63102

JAMES W. MCDADE
McDade and Lee
1130 Seventeenth Street
Washington, D.C. 20036

Best, Best & Krieger
Post Office Box 1028
Riverside, California 92502

By /s/ James H. Krieger
JAMES H. KRIEGER

Attorneys for Intervenor
Peabody Coal Company

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

vs

ROGERS C. B. MORTON, ET AL., DEFENDANTS

PATRICK J. McDONOUGH, APPLICANT FOR INTERVENTION

INTERVENOR'S ANSWER

* * *

PATRICK J. McDONOUGH, Intervenor herein, for his pleading in intervention, answers the Complaint on file and alleges as follows:

I. ANSWER TO FIRST CLAIM

First Defense

1. The First Claim of the Complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Answering paragraph 1 of the Complaint, Intervenor admits that coal reserves in the region referred to are extensive; denies that there have been any unlawful omissions in the preparation of environmental statements.

3. Answering paragraph 2 of the Complaint, Intervenor denies that jurisdiction is well founded; denies that the matter in controversy exceeds \$10,000.00.

4. Answering paragraphs 3 through 9 of the Complaint, Intervenor alleges that he is without knowledge regarding the legal status, composition, and membership of the plaintiffs, and therefore denies the allegations contained in these paragraphs.

5. Answering paragraph 10 of the Complaint, Intervenor alleges that he is without knowledge as to the membership of the plaintiff organizations, and therefore denies the allegations contained in paragraph 10.

6. Answering paragraphs 11 through 19 of the Complaint, Intervenor denies that the duties of the offices therein mentioned are as broad as alleged in the Complaint; denies that the officers therein mentioned have made unlawful omissions in the execution of their duties as they relate to the relief prayed for in the Complaint.

7. Answering paragraphs 20 through 37 of the Complaint, Intervenor admits that coal reserves are contained in the property mentioned in the Complaint; is without knowledge of the detailed statistics set out in these paragraphs of the Complaint, and therefore denies the same; denies that the actions or decisions of the defendants will result in severe harm in the environment of the property specified in the Complaint.

8. Answering paragraphs 38 and 39 of the Complaint, Intervenor denies that 42 U.S.C. Section 4332(2) (c) is quoted within its context of meaning; denies that the defendants have acted unlawfully; alleges that paragraph 39 of the Complaint contains no allegations at all.

Third Defense

9. The Complaint violates Rule 8(a)(2), Federal Rules of Civil Procedure, and therefore entitles plaintiffs to no relief.

Fourth Defense

10. No actual controversy exists, and the plaintiffs are therefore entitled to no relief under their Complaint.

II. ANSWER TO SECOND CLAIM

First Defense

11. The Second Claim of the Complaint fails to state a claim upon which relief can be granted.

Second Defense

12. Intervenor reasserts paragraphs 2 through 7, above, as though fully set out herein.

13. Answering paragraph 40 of the Complaint, Intervenor admits that 42 U.S.C. Section 4332(2) requires certain action on the part of federal agencies, to the fullest extent possible; denies that the defendants have acted unlawfully; alleges that paragraph 40 of the Complaint contains no allegation at all.

Third Defense

14. The Complaint violates Rule 8(a)(2), Federal Rules of Civil Procedure, and therefore entitles plaintiffs to no relief.

Fourth Defense

15. No actual controversy exists, and the plaintiffs are therefore entitled to no relief under their Complaint.

WHEREFORE, Intervenor Patrick J. McDonough prays that this Court:

1. Dismiss the Complaint on file herein.
2. Provide such other relief to the Intervenor as the Court may deem just and appropriate.

HUTTON, SCHILTZ & SHEEHY
400 Electric Building
Billings, Montana 59101

COLLIER, SHANNON, RILL
& EDWARDS
1624 Eye Street, N.W.
Washington, D.C. 20006

By /s/ Max N. Edwards
MAX N. EDWARDS

Attorney for Applicant for
Intervention,
Patrick J. McDonough

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB ET AL., PLAINTIFFS

vs

ROGERS C. B. MORTON, ET AL., DEFENDANTS

THE CROW TRIBE OF INDIANS, INTERVENOR-DEFENDANT

SEPARATE ANSWER OF THE CROW
TRIBE OF INDIANS

For its answer to the First and Second Claims of the Complaint this defendant, The Crow Tribe of Indians of the Crow Reservation, Crow Agency, Montana, admits, denies and alleges:

First Defense

1. The First and Second Claims of the Complaint fail to state claims upon which relief may be granted.

Second Defense

2. Answering paragraphs 1 through 10, this defendant is, at this time, without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

3. Answering paragraph 11, this defendant denies the allegations contained therein, insofar as they state that the Secretary of the Interior has the "authority and responsibility . . . under 25 U.S.C. 396 *et seq.*, to lease lands in any Indian reservation for mining purposes . . ." for the reason that the statutes, regulations and practices which govern issuance of mining leases affecting Indian lands grant leasing authority and responsibility to the appropriate tribal council or other

governing body subject only to the requirement that such leasing conform to the rules and regulations adopted by the Secretary of the Interior and that such leases be approved by the Secretary of the Interior. This defendant is, at this time, without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph 11.

4. Answering paragraphs 12 through 37, this defendant is, at this time, without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

5. Answering paragraph 38, this defendant admits that "The Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, requires that Federal agencies prepare an environmental-impact statement before undertaking any 'major federal actions significantly affecting the quality of human environment.' 42 U.S.C. 4332(2)(C)" but denies each and every other allegation contained therein.

6. Answering paragraph 39 this defendant denies each and every allegation contained therein.

7. Answering paragraph 40, this defendant admits that "Section 102(2)(A) of NEPA, 42 U.S.C. 4332(2)(A), required 'all agencies of the federal government . . . [to] utilize a systematic, interdisciplinary approach which will insure the intergrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment.' Section 102(2)(D), of NEPA, 42 U.S.C. 4332(2)(D), requires 'all agencies of the federal government . . . [to] study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative use of available resources.'" but denies each and every other allegation contained therein.

8. Answering all allegations of the Complaint which either state or infer that the substantive or procedural provisions of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, (NEPA) apply to the functions of the United States of America or its agencies acting in their capacity as trustee of Indian lands, denies, the same for the reasons that:

(a) Lands owned by various individual Indians and tribes of Indians are private lands in every respect with the sole exception that the United States of America has assumed the obligation of trustee with regard to the same which trust is to be administered for the best interest and benefit of the Indian owners.

(b) NEPA does not regulate the rights of private landowners to use or dispose of their property, but rather applies specifically to federal actions.

(c) Application of NEPA to the functions of the United States of America or its agencies, acting in its capacity as trustee of Indian land, will seriously affect present and future generations of Indian people by causing the trustee to restrict alienation of Indian lands for reasons other than the best interest and benefit of the Indian owners (in that such restrictions will be imposed for the benefit of the non-Indian community), all of which would violate the moral and legal obligation of the trustee to its Indian beneficiaries.

(d) Application of the NEPA to the functions of the United States of America or its agencies, acting in its capacity as trustee of Indian lands, will deny the Indian owners equal protection of the laws for the reason that such application will place restrictions upon alienation of Indian lands which do not exist upon alienation of non-Indian private lands.

(e) Functions of the United States of America, or its agencies, acting in its capacity as trustee of Indian lands, are not "major federal action" as the term is used in Section 102(2)(C) of NEPA.

Third Defense

9. The Complaint violates Rule 8(A)(2) and Rule 8(e)(1), Federal Rules of Civil Procedure and therefore entitles the plaintiff to no relief.

WHEREFORE, this defendant prays for judgment as follows:

(a) Dismissing the plaintiffs' Complaint insofar as it requests that this court apply NEPA to the functions of the United States of America, or its agencies, acting in its capacity as trustee of Indian land.

(b) Providing such other relief to this defendant as the court may deem just and appropriate.

DATED this 10th day of Aug., 1973.

EVALYN B. CARSON
General Counsel
The Crow Tribe of Indians
1015 Broadwater Ave.
Billings, Montana

Stephen N. Shulman
Attorney for the Crow Tribe
Of Indians
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 659-4700

By /s/ Evalyn B. Carson
EVALYN B. CARSON
Attorneys for The Crow Tribe
of Indians

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF INTERVENORS PUGET SOUND
POWER & LIGHT COMPANY, PORTLAND GEN-
ERAL ELECTRIC COMPANY AND THE WASH-
INGTON WATER POWER COMPANY

For their answer, intervenors Puget Sound Power & Light Company, Portland General Electric Company and The Washington Water Power Company (Electric Companies) admit, deny and allege as follows:

I.

Admit that extensive coal reserves exist in the four-State region of northwestern Wyoming, eastern Montana, western North Dakota, and western South Dakota named in the complaint, that certain development of certain such reserves has begun or is expected, and that federal agencies may have made certain decisions concerning such development. Intervenors deny all remaining allegations of Paragraph 1.

II.

Respecting Paragraph 2, deny that this court has jurisdiction over the matters set forth in the complaint. Plaintiffs seek an advisory judgment. Jurisdiction does not exist under the Administrative Procedure Act, 5 U.S.C. 701-706, as plaintiffs are not seeking judicial review of agency action. The complaint does not state a claim for an injunction or mandamus.

III.

Are without knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraphs 3 through 9.

IV.

Admit that plaintiffs sue on behalf of their members as well as themselves and that many of their members are citizens, residents and landowners in the Northern Great Plains Region, and deny all other allegations contained in Paragraph 10.

V.

Admit the allegations set forth in Paragraphs 11 through 20.

VI.

Admit that the four-State region named in the complaint contains coal reserves, that certain of such coal is of low sulphur content, and that interest exists in developing certain of such coal. Intervenors are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 21.

VII.

Admit that a North Central Power Study has been prepared, and that such Study projects the construction of certain electric power plants and transmission lines. Intervenors are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 22.

VIII.

Admit that an Appraisal Report on Montana-Wyoming Aqueducts to provide water for the four-State region named in the complaint has been prepared, and that

electric power plants require water for operation. Intervenorors are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 23.

IX.

Are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24.

X.

Deny that the various aspects of the proposal heretofore alleged in the complaint are closely interrelated. Intervenorors admit that coal can be converted to electricity and other fuels, and that use of electricity in markets distant from its generation requires electric transmission lines. Intervenorors are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 25.

XI.

With respect to Paragraph 26(c), admit that the said two Colstrip mine mouth 700 megawatt power plants and associated facilities are planned by intervenor Electric Companies; that said plants are to be built as additions to, and that Puget Sound Power & Light Company has an ownership interest in, the said two Colstrip mine mouth 350 megawatt power plants and associated facilities under construction; that The Montana Power Company has segments under construction of transmission lines to extend from Colstrip; and that said Company has rights to more than sufficient water from the Yellowstone River for all four said Colstrip plants. With respect to Paragraphs 26(a) and (b), admit that Western Energy Company holds leases for the mining of coal owned by the United States and leased from others in the Port Union deposits named in the complaint, and that certain said coal will be mined at

Colstrip and supplied by Western Energy Company as fuel for the aforesaid four Colstrip power plants. Intervenorors are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 26.

XII.

Deny the allegations of Paragraph 27.

XIII.

Respecting Paragraph 28, admit that alternatives to development of the coal reserves named in the complaint may exist, and that said coal development can be accomplished in a variety of ways.

XIV.

Respecting Paragraph 29, admit that a careful and comprehensive study of available alternatives prior to development of the area's coal reserves would provide protection of the environment, and that such study would consider numerous issues.

XV.

Respecting Paragraph 30, admit that development of the area's coal reserves raises environmental questions requiring answers. Intervenorors deny that such questions have not been and are not being thoroughly studied.

XVI.

Are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 31.

XVII.

Admit that defendants have authority, responsibility and control over certain lands, minerals and activities in the four-State region named in the complaint, and

that defendants' decisions in these cases coming before them in the future respecting such will be important. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 32.

XVIII.

Admit that the United States has treated the coal development of this region as requiring comprehensive planning, as alleged in Paragraph 33.

XIX.

Are without knowledge or information sufficient to form a belief as to the truth of the allegation that no environmental impact statement has been prepared concerning any individual federal act relating to such coal development, and deny the remaining allegations of Paragraph 34.

XX.

Admit that the Montana Environmental Quality Council and the Montana Coal Task Force have made the reports named in Paragraph 35, and are without knowledge or information sufficient to form a belief as to the truth of the other allegations of Paragraphs 35 and 36.

XXI.

Deny all allegations of Paragraph 37.

XXII.

Admit that the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et. seq.*, requires federal agencies to prepare an environmental impact statement before taking certain actions, and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 38.

XXIII.

Deny the allegations of Paragraph 39.

XXIV.

Admit that the National Environmental Policy Act requires federal agencies to utilize interdisciplinary approaches and describe appropriate alternatives, and deny the remaining allegations of Paragraph 40.

XXV.

FIRST DEFENSE

Intervenor alleges that the complaint fails to state a claim upon which relief can be granted.

XXVI.

SECOND DEFENSE

Intervenor alleges that the complaint does not present a case of actual controversy, but rather seeks an advisory judgment, and no justiciable issues are presented.

XXVII.

THIRD DEFENSE

Intervenor alleges that the complaint does not allege that wrongful agency action has been taken, or is threatened, and the court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701, *et. seq.*

XXVIII.

FOURTH DEFENSE

Intervenor alleges that the complaint does not state that any defendant has failed or refused to perform a duty owed to plaintiffs, and that no facts are alleged to justify issuance of an injunction or other mandatory order.

Date: August 16, 1973

Respectfully submitted,

/s/ James D. O'Brien
JAMES D. O'BRIEN
Attorney for Puget Sound Power
& Light Company, Portland Gen-
eral Electric Company and The
Washington Water Power Com-
pany, Intervenor.

/s/ Wendell Lund
WENDELL LUND

/s/ Joseph B. Levin
JOSEPH B. LEVIN

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and

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Counsel for Puget Sound Power & Light Company

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Counsel for Portland General Electric Company

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Paine, Lowe, Coffin, Herman & O'Kelly
602 Spokane and Eastern Building
Spokane, Washington 99201
Counsel for The Washington Water Power Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

vs.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF INTERVENOR
CITIES SERVICE GAS COMPANY

For its answer, intervenor Cities Service Gas Company
admits, denies and alleges as follows:

I.

Admits that extensive coal reserves exist in the four-
state region of northeastern Wyoming, eastern Montana,
western North Dakota, and western South Dakota
named in the complaint, that certain development of cer-
tain such reserves has begun or is expected, and that fed-
eral agencies may have made certain decisions concerning
such development. Intervenor denies all remaining alle-
gations of Paragraph 1.

II.

Respecting Paragraph 2, denies that this Court has
jurisdiction over the matters set forth in the complaint.
Plaintiffs seek an advisory judgment. Jurisdiction does
not exist under the Administrative Procedure Act, 5
U.S.C. 701-706, as plaintiffs are not seeking judicial re-
view of agency action. The complaint does not state a
claim for an injunction or mandamus.

III.

Is without knowledge or information sufficient to form
a belief regarding the truth of the allegations of Para-
graphs 3 through 9.

IV.

Admits that plaintiffs sue on behalf of their members as well as themselves and that many of their members are citizens, residents and landowners in the Northern Great Plains Region, and denies all other allegations contained in Paragraph 10.

V.

Is without knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraphs 11 through 20.

VI.

Admits that the four-state region named in the complaint contains coal reserves, that certain of such coal is of low sulphur content, and that interest exists in developing certain of such coal. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 21.

VII.

Is without knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 22.

VIII.

Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 23.

IX.

Admits that some plans and proposals exist for coal gasification plants and those plants will require water. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24.

X.

Denies that the various aspects of the proposal heretofore alleged in the complaint are closely interrelated.

Intervenor admits that coal can be converted to gas and other fuels, and that use of gas in markets distant from its conversion requires pipelines. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 25.

XI.

Admits with respect to Paragraph 26(e) that Intervenor and Northern Natural Gas Company announced plans for four coal gasification plants in northern Wyoming and southeastern Montana and for a 700-mile gas pipeline. Admits with respect to Paragraph 26(a) that some leases and permits for coal exploration, mining and development have been issued by federal and private owners within the four state area. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 26.

XII.

Denies the allegations of Paragraph 27.

XIII.

Respecting Paragraph 28, admits that alternatives to development of the coal reserves named in the complaint may exist, and that said coal development can be accomplished in a variety of ways.

XIV.

Admits that a careful and comprehensive study of available alternatives prior to development of the area's coal reserves may consider numerous issues. Intervenor denies the remaining allegations in Paragraph 29.

XV.

Respecting Paragraph 30, admits that development of the area's coal reserves may raise environmental questions. Intervenor denies that such questions have not been and are not being thoroughly studied.

XVI.

Is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 31.

XVII.

Admits that defendants have authority, responsibility and control over certain lands, minerals and activities in the four-state region named in the complaint, and that defendants' decisions in these cases coming before them in the future respecting such will be important. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 32.

XVIII.

Is without knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 33.

XIX.

Is without knowledge or information sufficient to form a belief as to the truth of the allegation that no environmental impact statement has been prepared concerning any individual federal act relating to such coal development, and deny the remaining allegations of Paragraph 34.

XX.

Is without knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 35 and 36.

XXI.

Denies all allegations of Paragraph 37.

XXII.

Admits that the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, requires federal agencies to prepare an environmental impact statement before taking certain actions, and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 38.

XXIII.

Denies the allegations of Paragraph 39.

XXIV.

Admits that the National Environmental Policy Act requires federal agencies to utilize interdisciplinary approaches and describe appropriate alternatives, and denies the remaining allegations of Paragraph 40.

XXV.

First Defense

Intervenor alleges that the complaint fails to state a claim upon which relief can be granted.

XXVI.

Second Defense

Intervenor alleges that the complaint does not present a case of actual controversy, but rather seeks an advisory judgment, and no justiciable issues are presented.

XXVII.

Third Defense

Intervenor alleges that the complaint does not allege that wrongful agency action has been taken, or is threatened, and the court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

XXVIII.

Fourth Defense

Intervenor alleges that the complaint does not state that any defendant has failed or refused to perform a duty owed to plaintiffs, and that no facts are alleged to justify issuance of an injunction or other mandatory order.

Respectfully submitted,

ALFRED O. HOLL,
General Counsel
GRAYDON D. LUTHEY,
Senior Attorney
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73125

DALE A. WRIGHT,
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Washington, D.C. 20036

By /s/ Harold L. Talisman
Attorney for
Cities Service Gas Company

September 12, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ARKANSAS POWER & LIGHT COMPANY
9th and Louisiana Streets
Little Rock, Arkansas 72203
(501) 372-4311

OKLAHOMA GAS AND ELECTRIC COMPANY
321 North Harvey
Post Office Box 321
Oklahoma City, Oklahoma 73101
(405) 232-3366

APPLICANTS FOR INTERVENTION

ANSWER OF INTERVENORS
ARKANSAS POWER & LIGHT COMPANY AND
OKLAHOMA GAS AND ELECTRIC COMPANY

For its answer, intervenor Arkansas Power & Light Company and Oklahoma Gas and Electric Company admit, deny and allege as follows:

I

Admit that extensive coal reserves exist in northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota, that commercial development of some such reserves is expected within the next few years, and that federal agencies may have made many decisions concerning the development of such reserves; deny that there have been any unlawful emissions in the preparation of environmental impact statements or interdisciplinary studies; lack sufficient information and

knowledge to form a belief as to the remaining allegations of Paragraph 1.

II

Deny that this Court has jurisdiction over this action. The allegations of the complaint do not allege a justiciable controversy because plaintiffs seek an advisory judgment only. Jurisdiction does not exist under the Administrative Procedure Act, 5 U.S.C.A. §§ 701-706, because plaintiffs do not seek court review of agency action. The complaint does not state a claim for an injunction or mandamus.

III

Lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 3, 4, 5, 6, 7, 8, and 9.

IV

Lack knowledge or information sufficient to form a belief as to whether plaintiffs are authorized to sue on behalf of their members as well as themselves, whether they have many members who are residents and land owners in the Northern Great Plains region, or whether any such members are employed as ranchers or farmers or in recreational industries; admit that plaintiff organizations have members who may visit the Northern Great Plains region, and deny all other allegations contained in Paragraph 10.

V

Admit the allegations set forth in Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19.

VI

Admit that the area described in the complaint as the Northern Great Plains region contains vast reserves of coal with relatively low sulfur content, and that substantial interest exists in the development of such deposits; lack sufficient knowledge or information to form a belief as to the truth of the remaining allegations of Paragraphs 20 and 21.

VII

Admit that the Department of Interior has prepared reports entitled "North Central Power Study" and "Appraisal Report on Montana-Wyoming Aqueducts" which set forth the projections and analyses described in Paragraphs 22 and 23; lack sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraphs 22 and 23.

VIII

Lack sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 24.

IX

Admit that coal can be converted into electricity, gas, liquid fuel or petrochemicals at mine-mouth facilities and that appropriate transportation facilities would be needed for the transportation of these products to distant markets, or, alternatively, that the coal might be shipped directly to other locations for conversion near such markets, denies that any of the proposals as may exist for commercial development of the coal reserves in the Northern Great Plains region are interrelated; lack sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 25.

X

Lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26.

XI

Deny the truth of the allegations of Paragraph 27.

XII

Admit that numerous possible alternatives exist relating to the commercial development of the coal reserves of the Northern Great Plains region, as alleged in Paragraphs 28 and 29, one of which is the transportation of

coal for conversion and use outside the region after it is mined; admit the allegation of Paragraph 29 that a careful and comprehensive study of alternatives for commercial development of the coal reserves throughout the Northern Great Plains region could consider numerous issues; deny that any such study is needed to provide protection for the environment or is required by law.

XIII

Deny the truth of the allegations of Paragraph 30.

XIV

Admit that the federal agency defendants have authority over certain lands, minerals and activities relating to the coal reserves in the Northern Great Plains region, and that any decisions which they have made or will be making within their authority will be important to the commercial development of such coal reserves; lack sufficient information and knowledge to form a belief as to the remaining allegations in Paragraphs 31 and 32.

XV

Admit that the studies identified in Paragraph 33 have been completed or are underway; deny that the United States has treated the coal development of the Northern Great Plains region as requiring comprehensive planning.

XVI

Lack sufficient information or knowledge to form a belief as to the truth of the allegations in Paragraphs 34, 35, and 36.

XVII

Deny the truth of the allegations in Paragraph 37.

XVIII

Admit that the National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321 *et seq.*, requires that Federal agencies prepare an environmental impact statement before taking any "major Federal action significantly af-

fecting the quality of the human environment"; deny the truth of the remaining allegations of Paragraph 36.

XIX

Deny the truth of the allegations in Paragraph 39.

XX

Admit that the plaintiffs have correctly quoted from the National Environmental Policy Act of 1969 in Paragraph 40; deny the truth of the remaining allegations in Paragraph 40.

FIRST AFFIRMATIVE DEFENSE

Intervenors allege that the complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Intervenors allege that the complaint does not present a case of actual controversy, but rather seeks an advisory judgment, and no justiciable issues are presented.

THIRD AFFIRMATIVE DEFENSE

Intervenors allege that the complaint does not allege that wrongful agency action has been taken, or is threatened, and the Court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C.A. §§ 701 *et seq.*

FOURTH AFFIRMATIVE DEFENSE

Intervenors allege that the complaint does not state that any defendant has failed or refused to perform a duty owed to plaintiffs, and that no facts are alleged to justify issuance of an injunction or other mandatory order.

WHEREFORE, Intervenors pray that plaintiffs take nothing by reason of their complaint; that the Inter-

venors recover their taxable costs against plaintiffs herein and that the Court grant intervenors such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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Company

By /s/ Peyton G. Bowman, III
PEYTON G. BOWMAN, III

September 17, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL.

v.

ROGERS C. B. MORTON, ET AL.

ANSWER OF WESTMORELAND
RESOURCES, INTERVENING DEFENDANT

First Defense

1. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 1 of the Complaint.

2. Denied.

3-10. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 3-10 of the Complaint.

11-19. The names of the Defendants and their positions with the government are admitted. Their authority and responsibilities as stated in the Complaint constitute conclusions of law which require no answer.

20-26. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 20-26 of the Complaint.

27-34. Denied.

35-36. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 35-36 of the Complaint.

37. Denied.

38-40. The allegations contained in paragraph 38-40 of the Complaint constitute conclusions of law which require no answer.

Second Defense

So far as the Complaint relates to a proposed mining operation of this Intervenor, the case involves a wholly

localized coal mining operation, unrelated to any other mining operation within the four-state area. The coal to be mined has been leased by the Crow Tribe of Indians to Intervenor under a lease which has been approved by the Department of the Interior. The Bureau of Indian Affairs is in the course of completing an environmental impact statement on the basis of which the Secretary of the Interior may consider approval of Intervenor's coal mining plan. No other environmental statement or study is required by the National Environmental Protection Act prior to the approval of the mining plan by the Secretary since preparation of such a statement by the Bureau of Indian Affairs fully complies with the requirements of the Act. Therefore, the Complaint fails to state a claim upon which relief can be granted.

Third Defense

None of the reasons set forth in the Complaint as justification for the granting of equitable relief to the Plaintiffs, are applicable to the Intervenor's coal mining operation, and no basis is alleged in the Complaint for the granting of an injunction or other equitable relief against Intervenor for its mining operation. Plaintiffs will not suffer irreparable injury as a result of the proposed mining operation which will be entirely localized and will have a relatively small impact upon the environment. On the other hand, an injunction that would restrain the mining operation would have an adverse effect upon the nation's supply of coal and would cause Intervenor to suffer a substantial monetary loss.

Fourth Defense

Mining plans on Indian lands are not subject to the environmental policy of the National Environmental Policy Act, and consequently Plaintiffs fail to state a claim upon which relief can be granted in so far as they seek equitable relief in connection with Intervenor's Indian land mining operation.

Fifth Defense

Plaintiffs have failed to state a case that is ripe for judicial review.

Sixth Defense

With respect to any controversy which Plaintiffs have with Intervenor, Plaintiffs have no standing to maintain this suit.

Respectfully submitted,

/s/ Theodore Voorhees
THEODORE VOORHEES
Attorney for Westmoreland
Resources, Intervening
Defendant
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(202) 872-8600

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

vs

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER

Intervenor, Kerr-McGee Corporation, by its attorneys,
answers the complaint as follows:

First Defense

The complaint fails to state a claim upon which
relief can be granted.

Second Defense

The suit is premature with respect to alleged statu-
tory or regulatory violations and does not, therefore,
present a justiciable case or controversy as required by
the United States Constitution.

Third Defense

I

Intervenor admits that federal agencies will be called
upon to approve mine plans for its federal coal leases
in Wyoming and to grant rights of way in support of
these leases. Intervenor is without information to form
a belief as to the truth of the other allegations in para-
graph 1, except intervenor denies that defendants' pro-
posed actions with regard to intervenor's federal coal
leases in Wyoming violate the National Environmental
Policy Act.

II

Intervenor denies the allegations of paragraph 2 that
this court has jurisdiction over this action.

III

Intervenor is without information sufficient to form
a belief as to the truth of the allegations of paragraphs
3, 4, 5, 6, 7, 8, and 9 of the complaint.

IV

Intervenor is without information sufficient to form
a belief to the truth of the allegations in paragraph
10 except intervenor denies that operations on its federal
coal leases in Wyoming threaten or will threaten the
citizens and members of plaintiff's organizations with
destruction of their lands, water pollution, air pollution,
diversion of water, harm to fish, wildlife, crops or vege-
tation, loss of recreational opportunities, esthetic damage,
vastly increased population, or at all.

V

Intervenor admits the allegations of paragraphs 11,
12, 13, 14, 15, 16, 17, 18 and 19 of the complaint.

VI

Intervenor is without sufficient information to form
a belief as to the truth of the allegations contained in
paragraphs 20, 21, 22, 23 and 24 except intervenor ad-
mits that its federal coal leases in Wyoming contain
reserves sufficient to justify their development and that
intervenor will require rights of way for railroads, roads,
power lines, water wells and utilities to service its leases
and intervenor denies that its mine plans and operations
on its federal coal leases, which cover only a very small
area in the state of Wyoming, comprehend mine mouth,
coal burning electric power plants, or that its mine plans
and operations involve a network of ultra high voltage
power lines, water for its operations from sources other
than the lands comprehended by its leases, or that they re-
quire slurry pipelines or dramatic urban changes.

VII

Intervenor is without information sufficient to form a belief as to the truth of the allegations in paragraph 25 except that intervenor denies that all the various aspects for the proposals for exploiting the area's coal reserves are closely interrelated.

VIII

Intervenor is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 26, except intervenor admits that it is the lessee under five federal coal leases covering a very small area in Wyoming and that it is preparing mine plans for several of its leases and information for submission to USGS to assist in the preparation of NEPA impact statements in connection with its mine plans, that it will supply coal from its federal leases to public utilities providing electricity to residents of Arkansas, Louisiana and Texas, that the Burlington-Northern has applied to the Interstate Commerce Commission for a railroad from Douglas to Gillette, Wyoming, and that intervenor has obtained an option contract for water from the Bighorn Lake which is in no way included in Kerr-McGee's present plan to develop its federal coal leases in Wyoming.

IX

Intervenor is without information sufficient to form a belief as to the truth of the allegations in paragraph 27 except intervenor denies that its operations on its leases will cause or significantly contribute to the pollution, destruction, spoilage, and massive regional changes alleged in paragraph 27.

X

Intervenor is without sufficient information to form a belief as to the truth of the allegations in paragraph 28 except intervenor admits that if alternatives exist relating to the exploitation and development of the coal resources on its federal coal leases in Wyoming such alternatives can be considered in NEPA statements pre-

pared by the USGS in connection with the approval by the USGS of mine plans for intervenor's federal coal leases in Wyoming.

XI

Intervenor is without sufficient information to form a belief as to the truth of the allegations in paragraph 29 except intervenor denies that the study alleged is necessary for the protection of the environment surrounding the lands comprehended by intervenor's federal coal leases in Wyoming.

XII

Intervenor is without information sufficient to form a belief as to the truth of the allegations in paragraph 30 except intervenor denies that serious environmental questions will remain in connection with operation on intervenor's federal coal leases in Wyoming after submission by it to the USGS of its mine plans, rights of way applications, and information to assist the USGS in preparation of NEPA statements in connection with said plans.

XIII

Intervenor is without information sufficient to form a belief as to the truth of the allegations contained in paragraphs 31, 32, 33, 34, 35 and 36.

XIV

Intervenor denies the truth of the allegations of paragraphs 37, 38, 39 and 40 except intervenor admits the truth of the allegations contained in the first sentence of paragraph 38 and denies that NEPA requires preparation of a comprehensive environmental impact statement for actions by defendants named in the Complaint in connection with coal development in the Northern Great Plains Region as a condition precedent to the approval by the USGS of mine plans for operations on and applications for rights of way to service intervenor's federal coal leases in Wyoming.

XV

Intervenor denies each and every allegation of the Complaint not hereinbefore specifically admitted.

WHEREFORE, intervenor respectfully prays that the Complaint be dismissed.

Respectfully submitted,

/s/ Peter J. Nickles
PETER J. NICKLES
Covington & Burling
888 Sixteenth Street N.W.
Washington, D.C. 20006

/s/ Thomas R. Cochran
THOMAS R. COCHRAN
Kerr-McGee Corporation
Kerr-McGee Center
Oklahoma City, Oklahoma
73102

September 24, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v8

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF INTERVENOR
AMERICAN ELECTRIC POWER SYSTEM

For its answer, intervenor American Electric Power System admits, denies and alleges as follows:

I

Admits that extensive coal reserves exist in north-eastern Wyoming, eastern Montana, western North Dakota and western South Dakota, that commercial development of some such reserves is expected within the next few years, and that federal agencies may have made many decisions concerning the development of such reserves; denies that there have been any unlawful omissions in the preparation of environmental impact statements or interdisciplinary studies; lacks sufficient information and knowledge to form a belief as to the remaining allegations of Paragraph 1.

II

Denies that this Court has jurisdiction over this action. The allegation of the complaint do not allege a justiciable controversy because plaintiffs seek an advisory judgment only. Jurisdiction does not exist under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, because plaintiffs do not seek court review of agency action. The complaint does not state a claim for an injunction or mandamus.

III

Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 3, 4, 5, 5, 6, 7 and 9.

IV

Lacks knowledge or information sufficient to form a belief as to whether plaintiffs are authorized to sue on behalf of their members as well as themselves, whether they have many members who are residents and land owners in the Northern Great Plains region, or whether any such members are employed as ranchers or farmers or in recreational industries; admits that plaintiff organizations have members who may visit the Northern Great Plains region, and denies all other allegations contained in Paragraph 10.

V

Admits the allegations set forth in Paragraphs 11, 12, 13, 14, 15, 16, 17, 18 and 19.

VI

Admits that the area described in the complaint as the Northern Great Plains region contains vast reserves of coal with relatively low sulfur content, and that substantial interest exists in the development of such deposits; lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations of Paragraphs 20 and 21.

VII

Admits that the Department of Interior has prepared reports entitled "North Central Power Study" and "Appraisal Report on Montana-Wyoming Aqueducts" which set forth the projections and analyses described in Paragraphs 22 and 23; lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraphs 22 and 23.

VIII

Lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 24.

IX

Admits that coal can be converted into electricity, gas, liquid fuel or petrochemicals at mine-mouth facilities and that appropriate transportation facilities would be needed for the transportation of these products to distant markets, or, alternatively, that the coal might be shipped directly to other locations for conversion near such markets, denies that any of the proposals as may exist for commercial development of the coal reserves in the Northern Great Plains region are interrelated; lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 25.

X

Lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26.

XI

Denies the truth of the allegations of Paragraph 27.

XII

Admits that numerous possible alternatives exist relating to the commercial development of the coal reserves of the Northern Great Plains region, as alleged in Paragraphs 28 and 29, one of which is the transportation of coal for conversion and use outside the region after it is mined; admits the allegations of Paragraph 29 that a careful and comprehensive study of alternatives for commercial development of the coal reserves throughout the Northern Great Plains region could consider numerous issues; denies that any such study is needed to provide protection for the environment or is required by law.

XIII

Denies the truth of the allegations of Paragraph 30.

XIV

Admits that the federal agency defendants have authority over certain lands, minerals and activities relating to the coal reserves in the Northern Great Plains region, and that any decisions which they have made or will be making within their authority will be important to the commercial development of such coal reserves; lacks sufficient information and knowledge to form a belief as to the remaining allegations in Paragraphs 31 and 32.

XV

Admits that the studies identified in Paragraph 33 have been completed or are underway; denies that the United States has treated the coal development of the Northern Great Plains region as requiring comprehensive planning.

XVI

Lacks sufficient information or knowledge to form a belief as to the truth of the allegations in Paragraphs 34, 35 and 36.

XVII

Denies the truth of the allegations in Paragraph 37.

XVIII

Admits that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, requires that Federal agencies prepare an environmental impact statement before taking any "major Federal action significantly affecting the quality of the human environment"; denies the truth of the remaining allegations of Paragraph 38.

XIX

Denies the truth of the allegations in Paragraph 39.

XX

Admits that the plaintiffs have correctly quoted from the National Environmental Policy Act of 1969 in Para-

graph 40; denies the truth of the remaining allegations in Paragraph 40.

FIRST AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint does not present a case of actual controversy, but rather seeks an advisory judgment, and no justiciable issues are presented.

THIRD AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint does not allege that wrongful agency action has been taken, or is threatened, and the Court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C.A. §§ 701 *et seq.*

FOURTH AFFIRMATIVE DEFENSE

Intervenor alleges that the complaint does not state that any defendant has failed or refused to perform a duty owed to plaintiffs, and that no facts are alleged to justify issuance of an injunction or other mandatory order.

WHEREFORE, Intervenor prays that plaintiffs take nothing by reason of their complaint; that the Intervenor recover its taxable costs against plaintiffs herein and that the Court grant intervenor such other further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ Peter J. Nickles
PETER J. NICKLES
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(202) 293-3300

/s/ James B. Henry
JAMES B. HENRY
American Electric Power
System
Two Broadway
New York, New York 10004

October 2, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

vs

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF WISCONSIN POWER AND
LIGHT COMPANY

For its answer, intervenor Wisconsin Power and Light Company alleges:

1. Denies that it has knowledge or information sufficient to form a belief as to whether there is to be a massive development of northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota or as to whether this case arises out of any alleged development of said areas; admits that extensive coal reserves exist in said areas and that commercial development of some of said reserves is expected within the next few years; denies that it has knowledge or information sufficient to form a belief as to the nature of such development or any commercial, industrial or urban development incidental thereto; admits that Federal agencies may have made and may in the future made decisions concerning the development of such reserves; upon information and belief, denies that, incident to such development, there has been omitted any environmental impact statement or interdisciplinary study required by law; denies that any proposed actions on the part of defendants will be in violation of the National Environmental Policy Act.

2. Denies that the Court has jurisdiction over this action under the Administrative Procedure Act, 5 U.S.C. 701-706, in that no judicial review of any agency action is sought; denies that the Court has jurisdiction under 28 U.S.C. 1331(a) in that the Complaint does not allege

the existence of any controversy, the action seeking an advisory judgment only; denies that the Court has jurisdiction under 28 U.S.C. 1361 in that the Complaint does not state a claim for injunction or mandamus.

3. Denies that it has knowledge or information sufficient to form a belief as to the allegations in paragraphs 3 through 9 of the Complaint.

4. Denies that it has knowledge or information sufficient to form a belief as to whether plaintiffs are authorized to sue in behalf of their members, as to whether they are authorized to sue in behalf of themselves, as to whether they have members who are residents and landowners in the Northern Great Plains region, as to whether any such members are ranchers and farmers, or operate or are employed in recreational industries; denies that any such ranchers and farmers are threatened by the destruction of their land by any cause; denies that those who operate or are employed in recreational industries are threatened by the loss of any lands, by any harm, destruction, pollution of lands, the air or any waters; denies that there is any threat of being forced to breathe polluted air, any loss of recreational opportunities, any aesthetic damage.

5. Admits the allegations contained in paragraphs 11 through 19 of the Complaint.

6. Admits that the area described as the Northern Great Plains region contains vast reserves of low sulfur content coal; admits that substantial interest exists in the development of such coal deposits; denies that it has knowledge or information sufficient to form a belief as to the truth as to the remaining allegations of paragraphs 20 and 21 of the Complaint.

7. Admits that a North Central Power Study and an Appraisal Report on Montana-Wyoming Aqueducts have been prepared; denies that it has knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraphs 22 and 23 of the Complaint.

8. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24 of the Complaint.

9. Upon information and belief, denies that the various aspects of the plans to develop the area's coal reserves are closely interrelated; admits that coal can be converted into electricity and other fuels and that transportation facilities would be needed for the transportation of such electricity and other fuels to distant markets or that coal might be shipped to other locations for conversion near such markets; denies that it has knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 25 of the Complaint.

10. As to the allegations of paragraphs 26 (a) and (b), intervenor Wisconsin Power and Light Company alleges that it has a contract with Western Energy Company, a wholly owned subsidiary of Montana Power Company, for the purchase of coal in Rosebud County, Montana; alleges, upon information and belief, that Western Energy Company holds, and since 1959 has held leases for the mining of coal owned by the United States as well as leased from other owners and has operated a mine at Colstrip, Montana, since 1923; denies that it has knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 26 of the Complaint.

11. Upon information and belief, denies the allegations of paragraph 27 of the Complaint.

12. Admits that there are possible alternatives as to the commercial development of the coal reserves in said areas; admits that a study of such alternatives could consider numerous issues; upon information and belief, denies that any such study is required by law or to protect the environment.

13. Upon information and belief, denies the allegations in paragraph 30 of the Complaint.

14. Admits that the Federal agency defendants have authority over certain lands, minerals and activities relating to the coal reserves in the Northern Great Plains region and that said defendants' decisions in cases coming before it relative to the development of such coal reserves will be important; denies that it has knowledge or information sufficient to form a belief as to the truth

of the remaining allegations in paragraphs 31 and 32 of the Complaint.

15. Admit that the studies referred to in paragraph 33 of the Complaint have been completed or are in process; upon information and belief, denies that the United States has treated the coal development of the Northern Great Plains region as requiring comprehensive planning.

16. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 34, 35 and 36 of the Complaint.

17. Upon information and belief, denies the allegations in paragraph 37 of the Complaint.

18. Admits that the National Environmental Policy Act requires that Federal agencies prepare an environmental impact statement before taking certain actions; denies that it has knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 38 of the Complaint.

19. Upon information and belief, denies the allegations in paragraph 39 of the Complaint.

20. Admits that the National Environmental Policy Act requires federal agencies to utilize interdisciplinary approaches and to develop and describe certain recommended courses of action; upon information and belief, denies that any action or courses of action taken or not taken by defendants incident to the development of said coal reserves violates the National Environmental Policy Act.

21. Intervenor Wisconsin Power and Light Company further answering and by way of an affirmative defense alleges that the Complaint fails to state a claim upon which relief can be granted.

22. Intervenor Wisconsin Power and Light Company further answering and by way of a second affirmative defense alleges that the Complaint fails to state a cause of actual controversy, presents no justiciable issues but merely seeks an advisory judgment.

23. Intervenor Wisconsin Power and Light Company further answering and by way of a third affirmative defense alleges that the Complaint fails to state that any wrongful agency action has been taken or threatened or

that any agency action taken is sought to be reviewed and, therefore, the Court has no jurisdiction under the Administrative Procedure Act, 5 U.S.C.A. Section 701, *et seq.*

24. Intervenor Wisconsin Power and Light Company further answering and by way of a fourth affirmative defense alleges that the Complaint fails to state that any defendant has failed or refused to perform a duty owed to plaintiffs and fails to state any facts upon which any injunction or other mandatory order can issue.

WHEREFORE, Intervenor demands judgment dismissing plaintiffs' Complaint together with its costs and disbursements herein.

/s/ Eugene O. Gehl
EUGENE O. GEHL
Attorney for Wisconsin
Power and Light
Company
Post Office Box 1767
122 West Washington
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53701

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF NORTHERN
NATURAL GAS COMPANY

For its answer, Northern Natural Gas Company admits, denies, and alleges as follows:

I.

Admits that vast coal reserves may exist in the states of Montana, Wyoming, North Dakota, and South Dakota and that federal agencies may have made certain decisions concerning the development of these resources; denies all remaining allegations in Paragraph I.

II.

Denies that this Court has jurisdiction over this action. The allegations of the complaint do not allege a justiciable case or controversy as plaintiffs seek an advisory judgment. Jurisdiction does not exist under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, because plaintiffs are not seeking to review agency action. The complaint does not state a claim for an injunction or mandamus.

III.

Is without sufficient knowledge or information to form a belief regarding the truth of the allegations of Paragraphs 3 through 9.

IV.

Admits that plaintiffs sue on behalf of their members as well as themselves; is without sufficient knowledge or information at this time to form a belief regarding the allegation that many of plaintiffs' members are citizens, residents and landowners in the Northern Great Plains Region; denies all other allegations contained in Paragraph 10.

V.

Is without sufficient knowledge or information to form a belief regarding the truth of the allegations contained in Paragraphs 11 through 19.

VI.

Admits that the Northern Great Plains Region may contain vast coal reserves and that interest may exist in developing this coal. Is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraphs 20 through 23.

VII.

Admits that plans and proposals may exist for coal gasification plants and that coal gasification plants require water. Is without sufficient knowledge or information at this time to form a belief as to truth of the remaining allegations in Paragraph 24.

VIII.

Admits that coal can be converted to gas and that use of gas in markets distant from the Northern Great Plains Region may require pipelines. Denies that all the various aspects of the proposals alleged in the complaint are closely interrelated. Is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 25.

IX.

Admits that Northern and Cities Service Gas Company announced plans for four coal gasification plants in nor-

thern Wyoming and southeastern Montana and for a 700-mile gas pipeline (Paragraph 26(c)). Admits that some coal leases and permits for coal exploration, mining, and development may have been issued by landowners within the Northern Great Plains Region (Paragraph 26(a)). Is without sufficient knowledge or information at this time to form a belief as to the truth of the remaining allegations of Paragraph 26.

X.

Denies the allegations of Paragraph 27.

XI.

Admits that alternatives may exist in the development of the coal resources in the region and is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 28.

XII.

Admits that a careful and comprehensive study of alternatives for commercial development of the coal reserves in this region could consider numerous issues; denies the truth of the remaining allegations contained in Paragraph 29.

XIII.

Admits that development of the area's coal reserves may raise environmental questions; denies the truth of the remaining allegations in Paragraph 30.

XIV.

Admits that certain defendants may have authority over certain lands, minerals and activities in the Northern Great Plains Region and that the decision these defendants make in the future respecting this area may be important. Is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraphs 31 and 32.

XV.

Admits that the studies referred to in Paragraph 33 may be underway or have been made. Is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraphs 33, 34, 35 and 36.

XVI.

Admits that the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq., requires federal agencies to prepare environmental impact statements before taking certain actions and to utilize interdisciplinary approaches and describe appropriate alternatives. Denies the truth of the remaining allegations in Paragraphs 37 through 40.

XVII.

Denies each and every allegation of the complaint not hereinbefore specifically admitted.

XVIII.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

XIX.

SECOND AFFIRMATIVE DEFENSE

The complaint does not present a case of actual controversy, but rather seeks an advisory judgment, and no justiciable issues are present.

XX.

THIRD AFFIRMATIVE DEFENSE

The complaint does not allege that any wrongful agency action has been taken, or is threatened, and the Court does not have jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701-706.

XXI.

FOURTH AFFIRMATIVE DEFENSE

The complaint does not state that any defendant has failed or refused to perform a duty owed to plaintiffs, and no facts are alleged to justify the issuance of an injunction or other mandatory order.

Respectfully submitted,

F. Vinson Roach, General Counsel
D. W. Wallace, Assistant General Counsel
D. B. O'Brien, Jr., General Attorney
2223 Dodge Street
Omaha, Nebraska 68102

Justin R. Wolf, Attorney
Charles A. Case, Jr., Attorney
David B. Ward, Attorney
Wolf & Case
1625 K Street, N.W.
Washington, D.C. 20006

By /s/ Charles A. Case, Jr.
CHARLES A. CASE, JR.

Attorney for Northern Natural
Gas Company

Dated: October 3, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

vs

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWER OF INTERVENER NEBRASKA
PUBLIC POWER DISTRICT, A
NEBRASKA CORPORATION

For answer, the intervener-defendant Nebraska Public Power District admits, denies and alleges as follows:

1. Admits that extensive coal reserves exist in the four-state region of northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota, that certain development of such reserves has begun or may begin in the future, and that prior to the adoption in 1969 of 42 U.S. Code Section 4321, et seq. some mining leases were approved. Intervener denies all remaining allegations of paragraph 1.

2. Denies that this Court has jurisdiction over the matters set forth in the complaint. There is no jurisdiction under the Administrative Procedure Act, as this action does not seek review of an agency action nor do the plaintiffs have standing under the Administrative Procedure Act. The intervener further denies that this action seeks mandamus, and therefore there is no jurisdiction under 28 U.S. Code, Section 1361. Intervenor further denies that the amount in controversy as to any individual plaintiff exceeds \$10,000.

3. Intervener has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3 through 9, and therefore denies.

4. Denies that the plaintiffs sue on behalf of their members, but admits that many of the members of the named plaintiffs are citizens, residents and landowners

in the northern great plains region. All other allegations contained in paragraph 10 are denied.

5. Admits the allegations in paragraphs 11 through 19.

6. Admits paragraph 20 except that the intervenor denies that most of the present population derives its livelihood from "ranching on the range lands and farming in the river valleys."

7. Admits that the four-state region named in the complaint contains coal reserves, that certain of the coal reserves are of low-sulphur content and that interest exists in developing the coal reserves. The intervenor has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 21, and therefore denies.

8. Admits that north central power studies have been prepared, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 22 and therefore denies.

9. Is without knowledge or sufficient information to form a belief as to the truth of the allegations of paragraph 23, and therefore denies.

10. Is without knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph 24, and therefore denies.

11. Denies that the various aspects of proposals for use of coal reserves are closely interrelated. Intervener admits that coal can be converted to electricity and other fuels, and that use of electricity in markets distant from its generation requires transmission lines. Intervener is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in paragraph 25, and therefore denies.

12. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 (a) through (j) and therefore denies.

13. Denies paragraph 27 (a) through (g).

14. Admits that alternatives to the development of the coal reserves named in the complaint may exist and the development could be accomplished in a variety of

ways, but denies that all methods mentioned in paragraph 28 offer a reasonable alternative.

15. Admits that a careful and comprehensive study as outlined in paragraph 29 could consider the issues listed in subparts (a) through (h).

16. Admits the development of the area's coal reserves raise environmental questions. Intervener denies that such questions have not been thoroughly studied. Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 31 and therefore denies.

17. Admits that important decisions will be made by the defendants in the future. Intervener is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in paragraph 32 and therefore denies.

18. Admits paragraph 33.

19. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 and therefore denies.

20. Admits paragraph 35.

21. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 and therefore denies.

22. Denies paragraph 37.

23. Admits the first sentence of paragraph 38. Intervener denies the remainder of paragraph 38.

24. Denies paragraph 39.

25. Admits the first two sentences of paragraph 40 but denies the remainder of paragraph 40.

26. Denies that the plaintiffs are entitled to the relief requested.

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Its Attorneys

By: _____
One of Said Attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, *et al.*, PLAINTIFFS

v.

ROGERS C. B. MORTON, *et al.*, DEFENDANTS

ANSWER OF PANHANDLE EASTERN
PIPELINE COMPANY

Intervenor Panhandle Eastern Pipeline Company for its answer to plaintiffs' complaint in the above-captioned action, admits, denies and alleges as follows:

FIRST DEFENSE

1. Intervenor admits that there are extensive coal reserves in the areas described in paragraph 1 of the complaint; that federal agencies have permitted prospecting and leasing of the coal reserves; and that a regional environmental impact statement has not been prepared. Intervenor denies that there has been any violation of the National Environmental Policy Act in connection with any of the federal actions admitted above.

2. Intervenor denies the allegations in paragraph 2 of the complaint.

3. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the complaint.

4. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the complaint but denies that intervenor's planned coal gasification project in northeastern Wyoming in any way threatens the members of plaintiffs organizations.

5. Intervenor admits the allegations in paragraphs 11, 12, 13, 14, 15, 16, 17, 18 and 19.

6. Intervenor admits the allegations in the first, second, third and fourth sentences of paragraph 20. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the remaining sentences of paragraph 20, but alleges that the description of the four-state area does not adequately or accurately describe the area in northeastern Wyoming wherein Intervenor's coal gasification project will be located.

7. Intervenor admits that the four-state area described by plaintiff contains vast coal reserves, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 21.

8. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 22 and 23 of the complaint.

9. Intervenor admits that it is proceeding with its plans for a coal gasification plant; denies that either the plant or the related coal mining operation will have any effect on the water resources or population growth of any area other than a very small area in northeastern Wyoming; and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 24 of the complaint.

10. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25, except that intervenor denies that the various aspects of the proposals for exploiting the area's coal reserves are closely interrelated.

11. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26, except that intervenor admits that it has a substantial investment in its planned coal gasification plant and related mining operations.

12. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27, except that intervenor denies that any of its activities will have the regional environmental consequences described by plaintiffs for the reason that such activities will be localized in one small area of Wyoming and will in all respects comply with applicable, federal and state environmental standards.

13. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 except intervenor admits that to the extent that various alternatives exist in connection with the development and utilization of intervenor's coal resources, such alternatives can be fully considered through a separate environmental impact statement covering intervenor's coal gasification project.

14. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29, except that intervenor denies that the National Environmental Policy Act will be violated unless all development of the coal resources within the four-state area is halted.

15. Intervenor lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30 except that intervenor denies that the National Environmental Policy Act will be violated if the defendants should grant authorizations in connection with intervenor's coal gasification project without first preparing a regional environmental impact statement.

16. Intervenor lacks knowledge and information sufficient to form a belief as to the truth of the allegations in paragraphs 31, 32, 33, 34, 35 and 36 of the complaint.

17. Intervenor denies the truth of the allegations in paragraphs 37, 38, 39 and 40 except that intervenor admits the first sentence of paragraph 38 of the complaint. Intervenor further alleges that there does not now exist a federally-approved plan for the development of the four-state area described by plaintiff in paragraph 1 of the complaint and that therefore, no comprehensive environmental impact statement is required by the National Environmental Policy Act.

18. Intervenor further denies each and every allegation of the complaint not hereinbefore specifically admitted.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The complaint fails to state a justiciable case or controversy. Plaintiffs prematurely ask for relief since they fail to allege that any major federal action has been taken which significantly affects the quality of the human environment within the meaning of the National Environmental Policy Act. Plaintiffs seek only an advisory opinion.

WHEREFORE, intervenor respectfully prays that the complaint be dismissed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

MORTON, ET AL., DEFENDANTS

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move under Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the grounds that the National Environmental Policy Act, 42 U.S.C. 4231, *et seq.* requires:

(1) the preparation and consideration of a comprehensive environmental-impact statement concerning coal development in the Northern Great Plains region before issuing coal prospecting permits or mining leases, entering into options or contracts for the sale of water or taking any other actions concerning coal development in the Northern Great Plains Region because the federal activities and plans relating to the development are closely interrelated and constitute a "major federal action significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)); and

(2) the carrying out of systematic interdisciplinary studies of the coal development in the Northern Great Plains region and the study of appropriate alternatives to this development.

Since defendants have not prepared and considered such a comprehensive environmental-impact statement or made such studies before issuing coal prospecting permits and mining leases, entering into options and contracts for the sale of water, and taking other actions concerning coal development in the Northern Great Plains region, they have violated the Act.

We do not believe that there is any genuine issue of fact relating to this motion.

Respectfully submitted,

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August 31, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1882-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

PEABODY COAL COMPANY, ET AL.,
INTERVENOR-DEFENDANTS

INTERVENOR-DEFENDANT'S MOTION
FOR JUDGMENT ON THE PLEADINGS

Intervenor-Defendants, by their attorneys, move the Court to enter judgment on the pleadings in favor of Defendants and Intervenor-Defendants on each of the following grounds, all as more fully set forth in the Memorandum of Points and Authorities filed herewith:

1. Neither the First Claim nor the Second Claim of the Complaint states a claim upon which relief can be granted.
2. The Complaint does not present a case or actual controversy, but rather seeks an advisory judgment.
3. The Complaint alleges that the Court has jurisdiction under the Administrative Procedure Act, 5 U.S.C. Section 701, *et seq.*, but does not allege that wrongful agency action has been taken or is threatened.

4. The Complaint does not allege that any Defendant has failed or refused to perform a duty owed to Plaintiffs, and the Court does not have authority to order acts committed by law to agency discretion.

Respectfully submitted,

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JAMES W. MCDADE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

**MOTION OF KERR-McGEE CORPORATION
FOR PARTIAL SUMMARY JUDGMENT**

The Intervenor-Defendant, Kerr-McGee Corporation ("Kerr-McGee"), respectfully moves for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure insofar as plaintiffs have requested equitable relief against the federal defendants in connection with action by them on any plans or applications relating to the mining of coal on Kerr-McGee's Lease Nos. Wyoming 0312311, 0313668, 0311810, 23928 and 24710. In support of its motion, Kerr-McGee states:

1. The United States Geological Survey ("USGS") will prepare a detailed environmental impact statement covering Kerr-McGee's mining plans pursuant to the provisions of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321, *et seq.* This environmental impact statement will be completed prior to any action by the federal defendants on Kerr-McGee's mining plans. No other environmental impact statement is required by NEPA prior to such federal action.

2. The complaint is not directed to the coal mining operation proposed by Kerr-McGee. Kerr-McGee does not plan mine-site processing of the coal. Its planned operations are limited to the mining and shipment of coal. Thus, no process discharge of effluent into the air or water will take place. Further, Kerr-McGee's proposed operations are limited to a small area in a single state, Wyoming, and have no regional impact. Accordingly, there is no basis for the granting of any injunction or

other equitable relief against the federal defendants insofar as it would preclude them from taking action with respect to Kerr-McGee's plans and applications prior to preparation of the regional environmental impact statement proposed by the plaintiffs.

* * *

Pursuant to paragraph (e) of this Court's Memorandum To Counsel, dated October 12, 1973, Kerr-McGee has refrained from discussion in its supporting memorandum of issues, both legal and factual, common to all intervenors. Such discussion is contained in the joint brief and supporting papers to be filed on behalf of all intervenors. Further, Kerr-McGee relies on the joint statement of material facts not in issue submitted by the intervenors.

Respectfully submitted,

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/s/ Thomas R. Cochran
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October 31, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

MOTION OF ATLANTIC RICHFIELD COMPANY
FOR PARTIAL SUMMARY JUDGMENT

Intervening defendant, Atlantic Richfield Company, ("Atlantic Richfield") hereby moves for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure insofar as plaintiffs have requested equitable relief against the federal defendants in connection with action by them on any plans or applications relating to the mining of coal on Atlantic Richfield's Lease No. Wyoming 2313, Campbell County, Wyoming. In support of this motion, Atlantic Richfield states:

1. That the United States Geological Survey (USGS) will prepare, pursuant to the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, a detailed environmental impact statement covering Atlantic Richfield's mining plans, proposed activities and necessary federal approvals. Such statement will be completed prior to any action by federal defendants on Atlantic Richfield's mining plans and proposed activities. No other environmental impact statement is required by NEPA prior to such federal action.
2. There is no basis for the granting of an injunction or other equitable relief against federal defendants insofar as it would preclude them from taking action with respect to Atlantic Richfield's plans and applications after preparation

of the environmental impact statement as proposed.

Atlantic Richfield's statement of material facts not in issue and memorandum of points and authorities in support of this motion provide further detailed support.

Respectfully submitted,

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Attorneys for Intervenor
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September 27, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

MOTION OF WESTMORELAND RESOURCES,
INTERVENING DEFENDANT, FOR PARTIAL
SUMMARY JUDGMENT

Intervenor hereby moves under Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment on the following grounds:

(1) On the undisputed facts, intervenor's proposed mining plan at Sarpy Creek, Montana, involves a localized operation having none of the detrimental characteristics set forth in the Complaint, and none of the reasons set forth by the Plaintiffs as justifying an order directing the preparation of an area-wide environmental impact statement, has any application to Intervenor's proposed mine.

(2) The Bureau of Indian Affairs has prepared an environmental impact statement which has been noticed in the Federal Register with respect to Intervenor's mining plan, and the requirements of NEPA have been fully met insofar as the preparation of an impact statement is concerned. Under these circumstances, NEPA does not require or permit the enjoining of Intervenor's mining plan pending the completion of the preparation of an area-wide environmental impact statement.

(3) The Complaint fails to state a claim on which relief can be granted with respect to a mining plan for coal resources privately owned by the Crow Tribe of Indians.

Intervenor does not believe that there is any genuine issue of fact relating to this motion.

Respectfully submitted,

THEODORE VOORHEES
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October 17, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

MOTION OF THE CROW TRIBE OF INDIANS,
INTERVENING DEFENDANT, FOR PARTIAL
SUMMARY JUDGMENT

The Crow Tribe of Indians, Intervening Defendant, hereby moves, under Rule 58 of the Federal Rules of Civil Procedure, for summary judgment on that part of the Plaintiffs' claim that deals with the approval of leases and mining plans involving lands or resources of the Crow Tribe of Indians. A summary judgment should be entered in favor of the Crow Tribe of Indians and against the Plaintiffs on the ground that the National Environmental Policy Act, 42 U.S.C. 4231 et seq., neither requires nor permits the preparation and filing of a comprehensive area-wide environmental impact statement prior to approval by the Federal Defendants of leases and mining plans affecting Crow Indian coal.

The Crow Tribe of Indians incorporates herein by reference the Statement of Material Facts as to Which There is No Genuine Issue which has been filed by Intervenor, Westmoreland Resources, with respect to its Motion for Summary Judgment.

The Memorandum of Points and Authorities accompanying this motion demonstrates that there is no genuine issue of any material fact relating to the portion of this litigation in which this Intervenor is interested and that this Intervenor is entitled to judgment as a matter of law.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

MORTON, ET AL., DEFENDANTS

INTERVENING DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT

The undersigned intervening defendants hereby move the Court, pursuant to Rule 56 F.R. Civ. P., to enter a summary judgment dismissing the complaint.

The grounds for this motion are that the pleadings, answers to interrogatories, and affidavits on file show that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law, all as is more fully set forth in the memoranda of points and authorities filed in support of this motion.

Respectfully submitted,

[The parties of this Motion and their respective attorneys are listed on the following two pages.]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

FEDERAL DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

The federal defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move for summary judgment of dismissal on the grounds that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law.

This motion is based upon the accompanying memorandum of points and authorities in support and upon the:

1. Complaint;
2. Answer;
3. The federal defendants' answers and supplemental answers to plaintiffs' preliminary interrogatories;
4. A copy of a memorandum of August 8, 1973, from the Conservation Division of Geological Survey, attached as Exhibit 1;
5. The affidavit of the Secretary of the Interior and accompanying exhibits, attached hereto as Exhibit 2;
6. The order of September 24, 1973, by the United States Court of Appeals for the Eighth Circuit in *E.D.F. v. Froehlke*, No. 73-1619, of which the Court is asked to take judicial notice, and a copy of which is attached for convenience of the Court as Exhibit 3;

7. The order of July 20, 1973 by the Court of Appeals for the District of Columbia Circuit in *Scientists Institute v. AEC*, No. 73-1773, of which the Court is asked to take judicial notice and a copy of which is attached for convenience as Exhibit 4;
8. A copy of a memorandum of April 13, 1973, from the Secretary of the Interior to the Assistant Secretary for Congressional and Public Affairs, attached hereto as Exhibit 5; and
9. The exhibits attached to plaintiffs' memorandum of points and authorities.

Respectfully submitted,

/s/ Herbert Pittle
HERBERT PITTLE
Attorney, Department of
Justice
Room 2140 Tele: 739-2785
Washington, D.C. 20530
Attorney for Federal
Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1182-72

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

AFFIDAVIT OF ROGERS C. B. MORTON

City of Washington)
) ss
District of Columbia)

ROGERS C. B. MORTON, being duly sworn, deposes and says as follows:

1. I, Rogers C. B. Morton, am Secretary of the Interior. In such capacity I am the principal official of the Department of the Interior and responsible for directing and supervising all of its functions. With respect to the subject matter of this suit which relates to the development of coal in the Northern Great Plains Region, the Department has broad authority to issue coal leases and coal prospecting permits for coal on Federal lands, including lands wherein the United States has conveyed the surface interest but has reserved an interest in the coal; to approve exploration and mining plans; to enter into options and contracts for the sale and delivery of water; to issue right-of-way permits, and special use permits for transmission lines, plant sites, access roads, and other uses needed to obtain access to Federal, State, and private lands. In addition the Department has authority to approve coal leases and coal prospecting permits for Indian lands.

2. The authority of the Department with respect to the use and disposition of public lands and Indian lands and disposition of Federal water in the Northern Great Plains area confers upon the Department the ability to

review many of the company plans. The Department has and will continue to utilize this authority in a manner consistent with the requirements of the National Environmental Policy Act of 1969.

3. The Department is aware that individual companies have plans or are developing plans relating to the utilization of coal in the Northern Great Plains. The Department is not fully apprised of the existence or details of all of these plans. The plans are those of individual companies or groups of companies which are subject to change to reflect differences in air and water quality standards, land use policies, customers' demands, and developments in technology. The Department has no existing plan or program to develop or to encourage the development of the coal resources of the Northern Great Plains. The Department has attempted to develop a coordinated development plan (The North Central Power Study discussed in paragraph 4). However, the Department has taken action to control development of coal on a national basis and in the Northern Great Plains. It has initiated a study of a potential water resource project in southeastern Montana and northeastern Wyoming (The Montana-Wyoming Aqueducts Study, the status of which is discussed in paragraph 17). It has established a new national coal leasing policy (see paragraphs 5 through 10). It has halted the issuance of prospecting permits (paragraph 11). It has established a policy with respect to Indian lands (paragraph 12). It has instituted the Northern Great Plains Resource Program, hereinafter referred to as NGPRP (see paragraphs 13 through 15). These actions are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures of the National Environmental Policy Act of 1969.

4. On May 26, 1970, the Department of the Interior initiated the North Central Power Study. The purpose of that study was to investigate the potential for coordinated development of electric power supply in the North Central United States. The Phase I report, which

was a broad reconnaissance type study, was issued in October 1971 and utilities were given until July 1, 1972, to comment on the report. The responses received did not indicate that a plan for the coordinated development could be formulated and the study was terminated at the end of Phase I.

5. The new national coal leasing policy was announced on February 17, 1973. (The news release relating to that policy is attached hereto and marked Exhibit I.) This policy has both short-term and long-term aspects. One of the critical elements of the new national coal leasing policy is the preparation of an Environmental Impact Statement on the proposed Federal coal leasing in the United States. This statement is referred to as the coal programmatic EIS. The primary objective of the statement is to provide a national overview of the impact of the entire Federal coal leasing program on the quality of the human environment.

6. That statement will not deal with proposed developments as the Department can only speculate as to what proposals will be made by individual companies. It will serve as the foundation and framework for subsequent environmental analyses and supplemental statements which may be prepared for subregions, geological structures or basins or on an individual basis for coal management actions. Also, the coal programmatic EIS is essential to the development of a planning system to determine the size, timing and location of future coal leases in order to meet energy needs most effectively.

7. A working draft of the statement has been prepared and is currently undergoing internal review. When it is completed it will be issued in draft form for general agency and public comment. This will allow public involvement in the analysis and review of the Federal leasing policies and procedures which have an impact upon the environment. It is planned that the final coal programmatic EIS will be issued in early 1974 following consideration of comments and necessary review.

8. Prior to the issuance of the coal programmatic EIS in its final form and the development of the planning system, coal leases will not be issued except pursuant to

the short-term coal leasing policy which was announced in the news release of February 17, 1973 (Exhibit I). That policy dictates that coal leases will be issued only under the following conditions:

- a. When coal is needed now to maintain existing mining operations; or
- b. When coal is needed as a reserve for production in the near future; and
- c. When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and
- d. When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act.

9. The short-term leasing policy will restrain leasing in the Northern Great Plains region except under the conditions set forth in paragraph 8 and will limit the Department's actions to those for which it has adequate information basis. It is intended to insure that current coal production can continue and to prevent deficiencies in supplies of coal which are necessary to meet our continuing energy needs.

10. The preparation of the coal programmatic EIS will also assist the Department in complying with the policies and procedures of the National Environmental Policy Act of 1969 with respect to actions in the Northern Great Plains prior to its issuance in final form. The information compiled and developed will expand the Department's informational basis upon which decision will be made. The coal programmatic EIS in its present form contains material relative to the Northern Great Plains. The section on the various environments where coal occurs includes an extensive part on the Northern Great Plains Province with discussions relating to geology, topography, climate, hydrology, soils, vegetation, wildlife, land use, population patterns, and human value resources in the province. In addition, the section on

impacts on the environment from coal leasing contains a part on the impacts unique to the Northern Great Plains Province. Other material analyzed and developed in the coal programmatic EIS will be valuable in decision-making relative to the Northern Great Plains, such as discussions relating to measures to mitigate environmental impacts, alternative sources of energy and conservation of energy use.

11. The issuance of coal prospecting permits by the Department of the Interior was halted by Secretarial Order No. 2952 issued February 13, 1973 (a copy of that order is attached hereto as Exhibit II). No prospecting permits will be issued until further notice. The purpose of that order was to allow for the more orderly development of coal resources upon the public lands with proper regard for the protection of the environment in a manner consistent with the National Environmental Policy Act of 1969.

12. In fulfilling its fiduciary responsibilities, the policy of the Department with respect to approval of coal leasing on Indian lands is that approval will be granted where the tribal or individual Indian land owner desires to dispose of the minerals, where the terms and conditions of the lease are in the best interest of the Indian land owner, where appropriate environmental safeguards are imposed on the lessee and where the requirements of National Environmental Policy Act have been satisfied. (See Exhibit III attached hereto).

13. The NGPRP study was initiated by the June 30, 1972 memorandum attached as Exhibit IV and was announced in the press release of October 3, 1972, which is attached as Exhibit V. The study is to provide a tool for planning at all levels of government rather than to develop an actual plan. The most recent outline of the study is attached as Exhibit VI and a chronology of significant events is attached as Exhibit VII. The study is being conducted by an interagency, Federal-State Task Force with public participation. Its analyses are to be based on assumptions of various possible levels of resource development in order to provide an informational framework for informed decision-making and planning.

The study will consist of a series of investigations and studies conducted by work groups in seven principal areas of concern: regional geology; mineral resources; water (supply and quality); air quality; surface resources; social, economic and cultural aspects; and national energy consideration. The results of these investigations will be integrated into the development of scenarios for predicting the environmental and social consequences of various possible developments.

14. The NGPRP is financed and staffed and the study is underway. The Federal funds and staff committed for fiscal 1974 total \$1,150,000 and 68 federal man years of which the Department is contributing \$700,000 and 25 man years. The work groups are in the field and public meetings were held in the Northern Great Plains area during the month of July. (See news release of July 5, 1973, attached as Exhibit VIII).

15. The work groups are to complete their preliminary reports in the spring of 1974 and an overall interim report is to be prepared by June 1974. After review of the report decisions will be made concerning the necessity of further study in specific areas.

16. The policy of the Department with respect to resource development in the Northern Great Plains Areas was announced in the memorandum of June 30, 1972 (Exhibit IV) and reasserted in the memorandum of January 24, 1973 (a copy of that memorandum with enclosures is attached as Exhibit IX). The purpose of the policy is to insure that development does not proceed based solely on single purpose studies incapable of developing comprehensive information or by piecemeal actions which restrict future options. To fulfill that purpose the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains Areas will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary for review and concurrence prior to execution.

17. With respect to the Montana-Wyoming Aqueducts Study the decision was made in the fall of 1972 not to seek funding for the fiscal 1974 and no funding will be sought for fiscal 1975. That study and other proposals such as the Morehead Dam will be held in abeyance pending the results of the NGPRP study.

18. After completion of the coal programmatic EIS in early 1974, decisions will be made concerning supplemental statements necessary for coal management actions. It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner. Until those decisions are reached no new coal leases will be issued except pursuant to the short-term leasing policy. The interim report from the NGPRP will be available in the summer of 1974 and will provide an informational foundation for decision-making and planning. This information will be utilized in decision-making for all coal related actions in the Northern Great Plains areas and will form a useful reference source for preparing environmental analyses and statements on proposed actions or groups of actions in the Northern Great Plains area. Until the interim report is available decisions relating to coal development in the Northern Great Plains will be held in abeyance or submitted to the Under Secretary for review and concurrence.

/s/ Rogers C. B. Morton
Secretary of the Interior

Subscribed and sworn to before me this 26th day of October, 1973

/s/ illegible
Notary Public

My Commission expires April 14, 1977

EXHIBIT I

DEPARTMENT OF THE INTERIOR

news release

OFFICE OF THE SECRETARY

For Release February 17, 1973

SECRETARY MORTON ANNOUNCES
NEW COAL LEASING POLICY

A two-pronged coal leasing policy—aimed at helping to satisfy energy needs while respecting the integrity of the environment—was announced today by Secretary of the Interior Rogers C. B. Morton.

The new coal policy hinges on a series of short-term and long-term actions, which, the Secretary said, "will be made with clear recognition that there is growing need for low-sulfur coal to supply the Nation's needs for clean energy." He further stated:

"Coal is one of the most abundant energy resources. Most of the low-sulfur coal reserves of the U.S.—about 85 percent—are located on public lands in the West within the regulatory jurisdiction of the Interior Department. We must make increasing use of this resource. At the same time we must assure that development is carefully controlled to avoid environmental mistakes of the past and to keep our planning options open."

Secretary Morton said, the new coal leasing policy will operate in conformity with what he termed the Department's "overriding goals." These are three, he stated, describing them as follows:

- (1) to assure maximum environmental protection.
- (2) to provide for orderly and timely resource development, and
- (3) to assure a fair market value return for resources sold.

He also outlined steps he would take "to resolve the apparent conflict between the need to develop the resource and the need to protect the environment." The short-term application of controls would be effected as follows: Coal leases will be issued only under the following conditions:

- When coal is needed now to maintain an existing mining operation; or
- When coal is needed as a reserve for production in the near future; and
- When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and
- When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act.

Secretary Morton further stipulated that all pending and future applications for prospecting permits would be henceforth rejected until a thorough analysis of the current supply/demand situation can be made and more comprehensive planning of resource use can be accomplished.

"This short-term leasing policy is intended to insure that current coal production can continue," the Interior head stated. "It will prevent deficiencies in supplies of coal which are necessary to meet our continuing energy needs."

Long range aspects of the Secretary's leasing policy provide for:

- Development of an environmental impact statement on the Department's entire coal leasing program, supplementing this as necessary for appropriate impact reporting on a regional basis or for individual leases.
- Development of a planning system to determine the size, timing, and location of future coal leases in order to meet energy needs most effectively.

"The long-range aspects of the new leasing policy will combine a sound approach to development with an environmental ethic that will become the core of philosophy of Interior as a Department of Natural Resources," Secretary Morton said. "Wherever regulations need to be revised to put teeth into this approach, that will be accomplished with all the speed we can muster."

EXHIBIT II

[SEAL]

UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

February 13, 1973

ORDER NO. 2952

Subject: Issuance of Prospecting Permits for Coal

In the exercise of my discretionary authority under section 2(b) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(b)), I have decided not to issue prospecting permits for coal under that section until further notice and to reject pending applications for such permits in order to allow the preparation of a program for the more orderly development of coal resources upon the public lands of the United States under the Mineral Leasing Act, with proper regard for the protection of the environment.

Accordingly, no prospecting permits for coal under section 2(b) of the Mineral Leasing Act, *supra*, shall be issued until further notice. All pending applications for such permits shall be rejected, and any applications submitted in the future shall be promptly rejected.

Nothing in this memorandum shall be deemed to restrict the rights of holders of prospecting permits, issued prior to this directive, to obtain preference right coal leases under section 2(b), *supra*, or to prevent the issuance of competitive coal leases under section 2(a) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(a)).

I have determined that the issuance of this order is not such a major Federal action significantly affecting the quality of the human environment as to require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)).

/s/ Rogers C. B. Morton
Secretary of the Interior

EXHIBIT III

[SEAL]

UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

Apr. 13, 1973

Memorandum

To: Assistant Secretary for Congressional & Public Affairs

From: Acting Secretary of the Interior (Sgn; John C. Whitaker)

Subject: Department policy regarding mineral leasing of Indian lands

During my recent testimony before the Senate Interior and Insular Affairs Committee I was requested to submit a statement of Department policy regarding mineral leasing of Indian lands. The following statement sets forth that policy.

The policy of the Department of the Interior is to approve mineral leasing on Indian lands where:

- (a) the tribal or individual Indian landowner desires to dispose of the minerals;
- (b) the terms and conditions of the lease are in the best interest of the Indian landowner; and
- (c) appropriate environmental safeguards are imposed on the lessee, including satisfaction of the requirements of NEPA.

EXHIBIT IV

[SEAL]

UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

Jun. 30, 1972

Memorandum

To : Assistant Secretary—Fish & Wildlife & Park
Assistant Secretary—Management & Budget
Assistant Secretary—Mineral Resources
Assistant Secretary—Program Policy
Assistant Secretary—Public Land Management
Assistant Secretary—Water & Power Resources

From : Secretary

Subject: North Central Resource Study

The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environmental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

On April 11, in responding to a proposal from EPA concerning these coal fields, the Under Secretary stated our intention to conduct a comprehensive resource study involving Federal, State and local interests. In light of this, I have asked Assistant Secretary Larson to be Chairman of this task force; he will call a meeting to discuss plans for the study with a view to making a start early in the new fiscal year.

In the meantime, all leasing, environmental studies, feasibility studies, water contracts, rights-of-way and other actions related to development of coal and related resources will be held in abeyance or coordinated with the Secretary's Review Committee and approved by me.

/s/ Rogers C. B. Morton

cc: Under Secretary; Solicitor; Executive Assistant to the Secretary

EXHIBIT V

DEPARTMENT OF THE INTERIOR

news release

OFFICE OF THE SECRETARY

For Release Tuesday, October 3, 1972

INTER-AGENCY TASK FORCE CREATED TO
ASSESS IMPLICATIONS OF RESOURCE
DEVELOPMENT IN NORTHERN GREAT PLAINS

Secretary of the Interior Rogers C. B. Morton today announced the creation of an inter-agency Federal-State task force to assess the potential social, economic and environmental impacts which would result from future development of the vast coal deposits and other resources in five Northern Great Plains States—Montana, Wyoming, South Dakota, North Dakota, and Nebraska.

The project will be known as the Northern Great Plains Resource Program. It will be undertaken jointly by the Departments of the Interior and Agriculture, the Environmental Protection Agency and the Old West Regional Commission, representing both the Department of Commerce and the governors of the five States.

Other Federal agencies will be asked to help with the project and there will be ample provision for public involvement.

The area is estimated to contain about 40 percent of the Nation's coal resources, measured in trillions of tons of low-sulfur coal, of which about 35 billion tons are readily recoverable with existing technology. The coal is concentrated primarily in the Fort Union Formation in the Powder River Basin of Wyoming and Montana, and in the western part of the Williston Basin of Montana and the Dakotas. The impact on these four States and on Nebraska would be assessed by the task force.

Considerable Federal, State, local and industry activity already has been directed toward actual mining or planning for the mining of this coal and toward dealing with possible impacts, Secretary Morton explained. This

program would be an effort to coordinate on-going activities and build a policy framework which might help guide resource management decisions in the future.

"The Federal government is interested in getting as many involved groups as possible to cooperate in building a common data base regarding the area's resources, problems and potentials," the Secretary said. "Our approach then will be to jointly explore the issues and to develop a consensus on basic policies and guidelines for the region's development."

"With effective management of the resources, the Nation can have an energy fuel it so vitally needs for power production while minimizing environmental degradation," Secretary Morton said. "These major coal resources will be developed, that is inevitable, but how they are developed is of national interest. As a Nation we must learn to develop our resources without the traditional environmental losses. In charging this task force with the responsibility of detailing and publicly reviewing all aspects of the proposed development with a critical view toward the strict controls which will be mandated as this program goes forward."

Policy guidance for the study would be provided by a Program Review Board consisting of John W. Larson, Assistant Secretary of the Interior for Program Policy; John McGuire, Chief U.S. Forest Service, Department of Agriculture; Thomas E. Carroll, Assistant Administrator for Planning and Management, Environmental Protection Agency; and Robert L. McCaughey, Federal Co-Chairman, Old West Regional Commission.

Working with the Program Review Board will be representatives of the Governors of Wyoming, Montana, North Dakota, South Dakota and Nebraska. Other Federal agencies including the Atomic Energy Commission, National Science Foundation, U.S. Army Corps of Engineers, Federal Power Commission, Office of Science and Technology, Department of Commerce, Department of Transportation, Department of Housing and Urban Development, and the Council on Environmental Quality have been asked to participate.

The NGPRP is an outgrowth of public concern in the region and of prior studies of the region's resources undertaken by the Federal and State governments as well as private organizations. While these prior studies were limited in scope, the NGPRP will examine not only the coal resource and environmental factors, but other minerals such as uranium and bentonite, the oil and gas reserves, and such values as forage, forests, wildlife, water, recreation, and socio-economic factors resulting from population changes.

"Federal agencies have recognized the problem of many coordinated and partial attempts to deal with this region," Secretary Morton said. "For that reason the Federal agencies have joined in creating this task force and have enlisted the cooperation of the five governors."

The Secretary pointed out that development of the coal deposits could provide a major source of potential clean energy consistent with President Nixon's Clean Energy Message to Congress of June 4, 1971. At present the Federal government owns about 80 percent of the mineral resources of the region and has significant surface ownership. Ownership complexities involved Federal, State, railroad and private owners in total, partial, surface only, mineral only and other ownership.

While no deadline has been set for completion of the study, Secretary Morton said it is anticipated that it will take about three years and that preliminary results will be incorporated into regional planning and decision-making by the end of the first year.

[Material Deleted]

EXHIBIT VI

OUTLINE OF PLAN NORTHERN GREAT PLAINS RESOURCE PROGRAM

Introduction

The Northern Great Plains consisting of large segments of Montana, Wyoming, North Dakota, South Dakota, and Nebraska, contains vast amounts of economically obtainable, relatively low sulfur coal. Interest in the extraction and use of this coal stems primarily from the continuing rapid growth of national energy consumption, less rapidly growing domestic supplies of oil and gas, and increasing emphasis on improved urban air quality. The possibility of large scale development of the coal reserves has, at the same time, heightened regional concern for effective land use and resource planning. The inherent issues of environmental quality, mined area reclamation, competition for scarce water resources, development of other mineral resources, and potential effects on the people and economies of the Northern Great Plains States require consideration and resolution.

The local, state and Federal governments having responsibility for land use and resource planning decisions affecting the area face competing economic, social, and environmental alternatives. The Federal government makes decisions regarding leasing of coal on public and Indian lands, regulations for air and water quality, and development of water projects. Congress is considering several measures related to surface mining. The States also are concerned with resource development; many have considered or taken legislative action related to surface mining and have prepared State Implementation Plans for air quality under the Clean Air Act. Local governments promulgate zoning and land use plans, and provide for essential public services. Regional Commissions for economic development and water supplies share similar concerns and responsibilities. These activities often are not well coordinated and decisions often are made on an *ad hoc* basis.

These factors have led the five States and several Federal agencies to cooperatively initiate the Northern Great Plains Resource Program (NGPRP). This document sets forth the objectives, design outline and organization of the program.

Objectives

The primary objective of the NGPRP is to provide an analytical and informational framework for policy and planning decisions at all levels of government. The end result is intended to be a decision-making aid for local, State, and Federal interests who together must plan and manage the area's land and natural resources.

Although the principal issue concerns the development, or nondevelopment, of energy resources within the Powder River and Fort Union areas, particular emphasis is placed on coal resources. The program will provide data and a series of fully described alternative development strategies or "scenarios" to identify the economic, social and environmental consequences of various possible courses of action. Both quantifiable and nonquantifiable implications will be considered. The final report *will not recommend a preferred development plan* for the region. Rather, it will provide information on the balancing of values and net benefits of alternative strategies so as to encourage and facilitate coordinated planning at all levels.

The second objective is to encourage the organization of ad hoc institutional entities that will bring together all facets—local, State and Federal—concerned with collection and interpretation of information affecting the future development and quality of the region. This, too, would facilitate planning that would be coordinated for the entire region. The organization would draw from existing State-Federal mechanisms for socio-economic planning in the region, such as State planning groups, Title V Commission, and appropriate River Basin Commissions. Policy and decision-making authority must be retained by established agencies, organizations, and the

State and local entities. The NGPRP will contribute in every possible way to encourage this coordination.

A third objective, related to the second, is provision of a coordinating link between data collection, research, planning and operational resource management activities that exist within many different organizations. Such a link should assure rapid interchange of technology and methodology between individual programs associated with the NGPRP.

Scope and Guidance

All analyses will deal with the implications of proposed resource management actions for the five-state area. Although focus will center on the study area, and particularly Powder River and Fort Union resources, the program will adopt whatever appropriate perspective for each subject of analysis. For example, analysis of energy requirements will consider the national energy situation and its principal geographic components, as well as other demands for Great Plains coal.

Thus, in examining the alternatives of development of coal at rates comparable to historical rates as contrasted with the accelerated development, many now predict consideration will be given to the impact on the local economy, the protection and development of esthetic and cultural values of the region, and relation to the National energy situation. Likewise, in considering energy development cases, analyses of air quality, for example, will include implications of electrical generation in distant urban areas as opposed to generation in the study area, as well as the relative effects of each on local air quality. These two examples are meant to illustrate the wide range of concerns within the NGPRP.

The program will foster integrated consideration of basic natural resource use and protection, including human interests and economic and social development. It will consider the full range of economic, social, and environmental consequences of alternative plans of land and resource management in the region.

The accumulation of knowledge and analysis techniques has implications which extend beyond the study area and into other areas of the country that are confronted with similar problems. The resultant data may become a model for future studies or programs concerned with resources in other areas.

To the fullest possible extent all concerned entities will have the opportunity to participate in the design and implementation of the program. Vehicles for participation and use of study results will include public reports, direct participation in work groups when appropriate, and the periodic assembly of policy officers from involved local, State and Federal agencies, concerned individuals, and representatives of special interest groups, to discuss issues, alternatives, and possible joint regional policies.

The Program

The NGPRP will consist of a series of investigations and studies dealing with a common theme. The over-all study will be time-phased and, although a comprehensive final summary report, as well as one or more interim summary reports will be issued, study results will be reported as they are completed.

Frequent and timely reporting will provide maximum assistance to decision makers on issues which often cannot be delayed until a full, final report is issued.

The program has four principal sections: (1) program design, (2) region profiles and constraints, (3) alternate strategies and analyses of their consequences, and (4) preparation of reports.

1. *Program Design.* The first step of the program was to obtain review of the proposed program design by other Federal agencies, States, industry and interested citizens. This has been done and this document is the product of that effort. This Program Design document which discusses the nature of the data and methodology to be used, and which elaborates on the tasks and structure of the effort.

The Program Design is intended to be an evolving document rather than a fixed statement or work plan. The Program Management Team will continually modify its concepts, and refine ideas and tasks [sic] on the basis of experience gained and suggestions from co-workers and users during the course of the program.

2. *Regional Profile & Constraints.* Data will be collected and analyzed on: (a) physical characteristics of the region, (b) resources, such as minerals and fuels, wildlife and fisheries, scenic and recreational areas, timber, agricultural products and water—including their location, current use, ownership and control, (c) present baseline environmental quality, including data on solid waste generation and disposal, (d) regional infrastructure, (e) population density, distribution, and character, (f) regional social and economic attitudes, and (g) past and present activity. In short, complete ecological, natural resource, social and economic inventories will be developed, as specified in the Program Design phase. Inventory will begin with a review of the available data, will identify gaps and then recommend collection of data to fill those gaps. As data are gathered, they will be published.

To provide a basis for judging the feasibility of development and management alternatives, it will be necessary to identify and evaluate legal, institutional, social, economic, environmental, and physical constraints on resource development and management. The analysis of physical constraint will include, for example, the need to commit or divert a resource such as water, for the development of coal. Existing arrangements may limit the extent to which this can be done.

This phase of the program will include and emphasize an inventory of institutions and attitudes. The relevant institutional constraints are readily identified—The Clean Air Act, National Environmental Protection Act, mine reclamation laws, regional water compacts, mineral leasing laws, other related State and Federal laws, land ownership, and the like. Equally important are economic and social constraints on resource management alterna-

tives. A variety of attitudes and views must be surveyed and considered.

3. *Alternative Strategic & Analyses of their Consequences.* For the purpose of an initial analysis of the consequences of development it is proposed that the Program define several alternative development strategies which will probably be in the form of trial scenarios [sic]. These trial scenarios will be based primarily on simple supply/demand analyses. They will not significantly reflect constraints such as environmental standards that are associated with the consequences of their implementation and are intended to form a framework for the analytical work to be performed in the first year of the program. As the analysis phases progress, it is expected that these constraints will become more clearly identified. As this occurs, the scenarios will be appropriately modified in the following years.

The Program will assess the environmental, social and economic impact of the set of trial scenarios, which will include a baseline and four development alternatives. Each of the development scenarios will consist of two levels or rates of resource exploitation, the higher level being the maximum possible under the relevant constraints.

The five scenarios are defined as follows:

a. *Baseline*

Rates of growth in coal exploitation seen in recent years will continue. Coal would be used for the satisfaction of regional needs, together with some export. Present State and Federal policies toward development would continue.

b. *Mine-mouth scenario*

There will be a staged development of large mine-mouth generating plants, producing electricity mainly for export outside the region via high-voltage transmission lines. The power facilities may include gasification plants (producing low-BTU gas) intermediate to the mines and power plants.

c. *Coal conversion scenario*

Energy development will emphasize construction and operation of large coal conversion plants, producing high grade gaseous and fuels mainly for export outside the region via pipelines.

d. *Coal export scenario*

Coal mined within the region will be shipped East to fuel Midwestern power plants and other sources of demand. Construction of in-region generating or conversion plants will not exceed the level needed to supply regional demand.

e. *Mixed scenario*

Energy development will occur via a mix of mine-mouth plants, coal conversion facilities, and coal exports. The high version of this scenario represents the Department of the Interior's prediction of the most likely mix, and level of overall energy production, in light of projected regional and national demands.

The high versions of the mine-mouth, coal conversion, and coal export scenarios will generally represent an upper limit to the proposed development, based on demand considerations. The alternative strategies will be analyzed to determine economic, social and environmental implications locally, regionally, and nationally. These implications will be arrayed against a variety of goals and the results presented as objectively as possible.

4. *Reports.* A preliminary summary report will be issued during June 1974 indicating the results of work to date. In addition, it will indicate further analysis, research, and other action required to meet the stated objective. Backup detailed reports on various topics will also be produced.

As of this time, the several reports and their outlines are visualized as follows:

Organization and Participation

A schematic of the organization is shown in Attachment #2. Policy guidance and overall direction are provided by a high-level Program Review Board, which has ultimate authority over the Program. Day-to-day direction is in the hands of the Program Management Team. The Program Review Board will seek advice from other Federal agencies and State, citizen, and industrial organizations as appropriate. Individual advisors will be designated or approved by the Review Board. Advisory Groups, as well as interested private entities may also desire to exchange information with the Program Management Team and participate in the working groups. Such participation will be encouraged to the fullest possible extent.

Implementation of the program will be the responsibility of a Program Management Team, consisting of representatives from each of the major participating agencies. The Program work will be carried out by a cross-section of full and part time staff under the overall direction of the Program Management Team.

The Program Management Team has direct responsibility for developing the Program Design, coordinating the flow of work and preparing the Final Report. Work Groups representing particular areas of expertise and drawing from various agencies will be formed to carry out basic data collection and analysis. The Groups will be of interagency composition, including expertise from the State and local levels as well as the private sector. Group leaders have been selected on the basis of technical expertise in each particular subject.

Members of several groups may be called together on ad hoc task forces to work on specific topics, such as the analysis of impact for selected scenarios.

Some tasks, particularly those development regional profile data, will be assigned, fully or partially, to on-going State or Federal programs. As an example, one or more tasks or portions of several tasks related to surface re-

sources will be carried out by Agriculture's Surface Environment and Mining (SEAM) program, which will coordinate State, local, and Federal involvement through programs now in the planning stage. Leadership in other tasks or sub-tasks will be assigned to individuals or groups which now have key national roles, such as the collection and display of the geologic data base by the U.S. Geological Survey and the offices of various State geologists. As another example, on-going studies with EPA of national supply and [d]emand of energy and clean fuels will likely provide information useful to specific tasks under the development of constraints and strategies and under the analysis of alternatives.

Maximum reference to and use of on-going programs should prevent duplication of effort and speed completion of key jobs. However, full involvement of public agencies, industry, and individual knowledgeable about a subject will be necessary.

The Advisory Groups are expected to serve in effective review roles. Comments of participants can be incorporated directly in final papers, ensuring participation by all interested parties at the most opportune time. A specially selected group of Technical Advisors will be called upon as needed to review the efforts and products of the Work Groups.

Program Support

Manpower and funding to carry out the Program will be contributed by government agencies and redirected from other programs. Volunteers and contributed services from private organizations will be welcomed and utilized.

The Program Management Team must devote full time to the NGPRP.

* * * *

EXHIBIT IX

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOROFFICE OF THE SECRETARY
Washington, D.C. 20240

Jan. 24, 1973

Memorandum

To:

Assistant Secretary—Fish and Wildlife and Parks
 Assistant Secretary—Management and Budget
 Assistant Secretary—Mineral Resources
 Assistant Secretary—Program Policy
 Assistant Secretary—Public Land Management
 Assistant Secretary—Water and Power Resources

From:

The Secretary

Subject:

Control of Resource Development

The magnitude of potential resource development in the Southwest, the Northern Great Plains and elsewhere will require very careful attention in order to achieve environmentally acceptable operations under existing regulations. Until there is better legislation for leasing, mining and land use, this must be achieved by incorporating appropriate specific stipulations in all agreements involving major Interior actions and both the actions and the controlling stipulations must be carefully reviewed at the Departmental level to insure compliance with the spirit of the Environmental Policy Act.

The attached memoranda from late Under Secretary Pecora (June 16, 1971) and me (June 30, 1972) were aimed at providing this control over development of Southwest energy and Northern Great Plains resources, respectively. The "Outlines and Schedules of Actions to

Implement a Coal Leasing Program," issued by Bureau of Land Management memorandum dated December 4, 1972, is consistent with the Department objectives underlying this control system.

To insure continuing careful attention to the environmental significance of proposed resource development, all major Federal actions significantly affecting the quality of the human environment regarding resource development and, in addition, all actions of any kind regarding development of coal related to the Southwest and Northern Great Plains covered by the June 16, 1971, and June 30, 1972, memoranda referred to above shall be submitted to the Under Secretary for review and concurrence prior to execution. Other actions, which have not been identified for special review, shall be guided by the attached statement of Department policy.

/s/ Rogers C. B. Morton
 ROGERS C. B. MORTON

Enclosures

cc: Under Secretary; Solicitor; Executive Assistant to the Secretary

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Jun. 16, 1971

Memorandum

To:

Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary, Mineral Resources
Assistant Secretary, Public Land Management
Assistant Secretary, Water and Power Resources
Solicitor

From:

Under Secretary

Subject:

Federal Actions Relative to Pacific Southwest Electric Power Plants

Effective immediately any final action on permits, rights-of-way, grants, leases, contracts or memoranda of understanding affecting lands or water under the jurisdiction of the Department of the Interior, and approval of equipment specifications required by contract or other agreements, which may be concerned with the construction, expansion or operation of the Four Corners, San Juan, Mohave, Navajo, Huntington Canyon and Kaiparowits thermal electric generating plants and related facilities must be approved by the Under Secretary.

/s/ W. Pecora
Under Secretary

INTERIOR POLICY CONCERNING NATURAL
RESOURCES AND ENVIRONMENTAL QUALITY

The Department of the Interior is the Federal agency primarily responsible for management of much of the Nation's renewable and nonrenewable living and non-living resources. This requires protection of the environment in all development activities. In meeting this responsibility, the Department must strive for a balance between resource utilization and environmental quality. Both of these objectives must receive increased emphasis if an acceptable quality of life is to be maintained in the face of increasing resource needs.

It is, therefore, the policy of the Department of the Interior that, except where it would be legally impermissible:

- All natural resource development and management programs and plans formulated or implemented within the Department of the Interior shall conform to applicable Federal and State environmental quality standards and shall include special stipulations to mitigate potential environmental damages not adequately covered by State and Federal standards.
- All leases, contracts, agreements or other arrangements concerning living and nonliving resource management or development on all lands administered by the Department will be structured to assure that all operations on such lands conform to applicable State and Federal environmental quality standards and that they include special stipulations to mitigate potential environmental damage not adequately covered by existing State and Federal standards.
- All leases, contracts, agreements and other arrangements indirectly related to living and non-living resource development on public or private lands, such as those for Federal water services, rights-of-way across Interior-administered lands and other Federal involvements, will contain stip-

ulations to insure that development operations conform to applicable State and Federal environmental quality standards and comply with any special conditions deemed necessary by the Department of the Interior for protection of the environment.

- All leases, contracts, agreements and other arrangements that predate current environmental quality standards, and do not require compliance with such standards, shall be administered or revised where possible, and appropriate, to require an upgrading of technology in an orderly, practical schedule to achieve compliance with applicable Federal and State standards and special stipulations considered necessary by the Department for proper environmental protection.
- Resource developers seeking leases, contracts, agreements or other arrangements with the Department of the Interior shall submit advance plans of proposed operations for Departmental approval, unless this would be manifestly impractical in a given set of circumstances, and shall establish a reporting system on performance to regularly demonstrate compliance with applicable environmental quality standards and special stipulations. The Department will establish guidelines to facilitate submission and review of such plans.
- These policy guidelines shall apply to Indian lands insofar as they are not incompatible with the trust responsibilities of the Secretary and the Department of the Interior.

EXHIBIT 5

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

[SEAL]

Apr. 18, 1973

Memorandum

To:

Assistant Secretary for Congressional & Public Affairs

From:

Acting Secretary of the Interior
(Sgn) John C. Whitaker

Subject:

Department policy regarding mineral leasing of Indian lands

During my recent testimony before the Senate Interior and Insular Affairs Committee I was requested to submit a statement of Department policy regarding mineral leasing of Indian lands. The following statement set forth that policy.

The policy of the Department of the Interior is to approve mineral leasing on Indian lands where:

- (a) the tribal or individual Indian land-owner desires to dispose of the minerals;
- (b) the terms and conditions of the lease are in the best interest of the Indian landowner; and
- (c) appropriate environmental safeguards are imposed on the lessee, including satisfaction of the requirements of NEPA.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

ANSWERS OF DEFENDANT,
ROGERS C. B. MORTON, SECRETARY OF THE
INTERIOR, TO PLAINTIFFS' REVISED
SUPPLEMENTAL INTERROGATORIES TO
FEDERAL DEFENDANTS

The following answers are submitted on behalf of Defendant Rogers C. B. Morton, Secretary of the Interior to PLAINTIFFS' REVISED SUPPLEMENTAL INTERROGATORIES TO FEDERAL DEFENDANTS.

Interrogatory No. 1: Have any coal leases been issued by the Secretary of the Interior since February 17, 1973, which are not within the area subject to this litigation? If the answer is yes, where are those leases located and how many leases and how much acreage is involved:

Answer: The following coal leases have been issued by the Department of the Interior since February 17, 1973:

Lease	State	Date of Issuance	Acreage
ES-9403	Pennsylvania	7/1/74	29.661
ES-12284	Alabama	6/1/74	2388.24
U-13097	Utah	5/1/74	1310.00
C-17130	Colorado	12/1/73	241.10
			4018.95

Interrogatory No. 2: During 1974, did the Department of the Interior offer a coal lease on land near Stanton,

North Dakota? Was no lease issued only because no bid for the lease was made?

Answer: During 1974, the Department of the Interior offered to lease approximately 320 acres located three to five miles south of Stanton, North Dakota in Mercer County. On or before July 9, 1974, the date of the sale, no bids were received and therefore no lease was issued.

Interrogatory No. 3: Is the Department of the Interior presently considering entering into any leases under the four conditions set forth in the announcement of February 17, 1973? If the answer is yes, please provide the following information as to each lease:

- the name of the person or corporation seeking the lease
- the agency of the Department of Interior involved
- the acreage involved
- the approximate location.

Answer: No. The Department of the Interior has applications for leases pending before it. However, the Department has not concluded that any of these applications satisfy the four conditions of the short term leasing policy announced by Secretary Morton in the news release of February 17, 1973 and consequently is not at the stage of considering the offering of any leases as a result of those applications.

Interrogatory No. 4: When approximately does the Secretary of the Interior expect the moratorium on federal coal leasing to end? If the moratorium will end based on the occurrence of particular events, please state what events these are.

Answer: It is assumed that by the phrase "moratorium on federal coal leasing policy" the Plaintiffs are referring to the short term leasing policy announced in Secretary Morton's news release of February 17, 1973, and discussed in item 8 of Secretary Morton's October 26, 1973

affidavit. As stated in that item the short term leasing policy will remain in effect at least until after the issuance of the final coal programmatic EIS and the development of a planning system to determine the size, timing and location of future coal leases. The answer to interrogatory 30 discusses when the final coal programmatic EIS will be issued. It is possible that after the issuance of the final coal programmatic EIS the decision will be made to continue the short term coal leasing policy.

Interrogatory No. 5: Does the moratorium of February 17, 1973, also apply to preference-right coal leases?

Answer: It is assumed that by the phrase "moratorium of February 17, 1973" that Plaintiffs are referring to the short term leasing policy announced in Secretary Morton's news release of February 17, 1973. That news release states that coal leases will be issued only under the conditions set forth therein and no distinction is made between competitive and preference right leases. Therefore it must be concluded that the short term criteria have applied to preference right lease applications as well as competitive lease applications. Recently the Solicitor's office has advised that refusal to issue a preference right coal lease because it does not meet the short term criteria would be improper. Consideration is now being given to revising the short term leasing policy based upon this advice.

Interrogatory No. 6: Has the Secretary of the Interior granted any preference-right coal leases in the Northern Great Plains since February 17, 1973? If the answer is yes, please provide the following information as to each lease.

- a. the name of the person or corporation obtaining the lease
- b. the agency of the Department of the Interior entering into the lease
- c. the date of the lease
- d. the acreage involved

e. the approximate location

f. the reason for the lease despite the moratorium.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. The Secretary of the Interior has not issued any preference right coal leases within the States of Wyoming, Montana, North Dakota and South Dakota since February 17, 1973.

Interrogatory No. 7: State how many applications for coal leases in the Northern Great Plains are currently pending in the Department of the Interior and the total acreage they involve. Please provide this information separately for each agency of the Department of the Interior.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. There are 42 competitive lease applications pending for a total of 272,126.86 acres in the States of Wyoming, Montana, North Dakota, and South Dakota. All of the applications are before the Bureau of Land Management.

Interrogatory No. 8: State how many applications for preference-right coal leases in the Northern Great Plains are currently pending in the Department of the Interior and the total acreage they involve. Please provide this information separately for each agency of the Department of the Interior.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Da-

kota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. There are 80 preference right lease applications pending for a total of 201,668.11 acres in the States of Wyoming, Montana, North Dakota, and South Dakota. All of the applications are before the Bureau of Land Management.

Interrogatory No. 9: State how many applications for coal prospecting permits in the Northern Great Plains are currently pending in the Department of the Interior and the total acreage they involve. Please provide this information separately for each agency of the Department of the Interior.

Answer: Secretarial Order No. 2952 (attached as Exhibit II to the October 26, 1973 affidavit of Rogers C. B. Morton) directed that all pending applications for coal prospecting permits were to be rejected and that applications submitted in the future were to be promptly rejected. Pursuant to this policy all pending applications have been rejected and new applications are promptly rejected.

Interrogatory No. 10: Since February 17, 1973, has the Secretary approved any coal leases or permits on Indian lands which are not within the area subject to this litigation? If the answer is yes, where are those leases located and how much acreage is involved.

Answer: The Department of the Interior has not approved any coal leases or permits on Indian lands since February 17, 1973.

Interrogatory No. 11: State how many applications for coal leases on lands belonging to Indian tribes in the Northern Great Plains are currently pending in the Department of the Interior and the total acreage they involve.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Da-

kota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. There are no applications for coal leases on lands belonging to Indian tribes pending in the Department of the Interior. The Department either approves leases negotiated by the Indian tribes or approves leases which are a result of a preference right to a lease or an option to lease as part of a prospecting permit. At present there are applications for approval of coal leases on tribal lands in the States of Wyoming, Montana, North Dakota and South Dakota. The total acreage involved is 176,481.32 acres. The number of leases which could result from these applications is uncertain. Each request is the result of a preference right or option as part of a permit. A lease is limited to 2,560 acres by regulation, 25 CFR § 171.9 (b) (1), and each request is to go to lease on in excess of that limitation. Whether the acreage limitation will be waived according to the terms of the regulation to allow lease acreage in excess of the limitation or whether leases will be limited to 2,560 acres can not at this time be indicated.

Interrogatory No. 12: State how many applications for coal prospecting permits on lands belonging to Indian tribes in the Northern Great Plains are currently pending in the Department of the Interior and the total acreage they involve.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. There are no applications for coal prospecting permits on lands belonging to Indian tribes pending in the Department of the Interior. The Department only approves permits negotiated by the Indian tribes. At present there are no ap-

plications for approval of coal prospecting permits on Indian lands in the States of Wyoming, Montana, North Dakota and South Dakota.

Interrogatory No. 13: State how many coal leases approved by the Department of the Interior within the Northern Great Plains are currently outstanding and the total acreage involved. Please provide this information separately for each agency of the Department of the Interior and for leases on Indian lands. Please also provide this information separately for the eastern Powder River basin as that term is defined in the Eastern Powder River Environmental Impact Statement.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. In the States of Wyoming, Montana, North Dakota and South Dakota there are 124 outstanding leases issued by the Bureau of Land Management for a total of 251,449 acres and 10 outstanding leases on Indian lands for a total of 91,396 acres. The Eastern Powder River Coal Basin as defined in the Eastern Powder River Coal Basin EIS contains 42 of the outstanding leases issued by the Bureau of Land Management for a total of 93,075 acres and none of the leases for Indian lands.

Interrogatory No. 14: State how many of these outstanding leases in the Northern Great Plains are not yet covered by approved mining plans and how many leases are covered by approved mining plans. As to each of the two categories, state how much acreage is involved. Please give this information separately for each agency of the Department of the Interior and for Indian lands.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that

four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. In the States of Wyoming, Montana, North Dakota and South Dakota 95 leases issued by the Bureau of Land Management with a total acreage of 196,642 acres are not the subject of an approved mining plan and 9 outstanding leases on Indian lands with a total of 76,650 acres are not the subject of an approved mining plan. In that area 29 leases issued by the Bureau of Land Management with a total of 54,807 acres have acreage within an approved mining plan and one lease on Indian lands with a total of 14,746 has acreage within an approved mining plan.

Interrogatory No. 15: State how many mining plans have been approved by the Secretary of the Interior within the Northern Great Plains since October 26, 1973, when Secretary Morton submitted his affidavit. For each mining plan, please provide the following information as to each mining plan:

- a. name of person or corporation submitting the plan
- b. agency of the Department of the Interior to which the plan was submitted
- c. date of the submission
- d. acreage involved
- e. approximate location.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. Mining plans are submitted to the Geological Survey. In the States of Wyoming, Montana, North Dakota and South Dakota four mining plans have been approved since October 26, 1973.

Company	Date of Submission	Acreage in Plan	Location
Amax Coal Company (Modification of mining plan)	November 7, 1973	72	Campbell Co., Wyoming
Peabody Coal Co.	March 13, 1973	640	Rosebud Co., Montana
Western Energy	October 12, 1973	150	Rosebud Co., Montana
Westmoreland Resources	November 1, 1972	245	Hardin Co., Montana

Interrogatory No. 16: State how many applications for approval of mining plans in the Northern Great Plains are currently pending in the Department of the Interior and the total acreage involved. Please provide this information separately for each agency of the Department of the Interior for Indian lands.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. In the States of Wyoming, Montana, North Dakota, and South Dakota there are currently pending before the Geological Survey 12 mining plans which involve 12 leases with a total of 78,776 acres. One application is for approval of a mining plan on one lease for 30,248 acres of Indian land.

Interrogatory No. 17: State how many coal prospecting permits approved by the Department of the Interior within the Northern Great Plains giving a preference-right to coal leases are currently outstanding in the Northern Great Plains and the total acreage involved. Please provide this information separately for each agency of the Department of the Interior and for Indian lands. Please also provide this information separately for the

eastern Powder River basin as that term is defined in the Eastern Powder River Environmental Impact Statement.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. All coal prospecting permits issued by the Department of the Interior are issued pursuant to Section 2 of the Mineral Leasing Act of 1920 (30 U.S.C. § 201) which states that a permittee shall be entitled to a lease if the permittee shows that the lands contain coal in commercial quantities. In the States of Wyoming, Montana, North Dakota, and South Dakota there are 30 outstanding coal prospecting permits issued by the Department of the Interior including 82,952.18 acres. With respect to coal prospecting permits on Indian lands in the four state area, all outstanding permits grant the right to the permittee to obtain a lease. There are 17 outstanding coal prospecting permits on Indian lands including 100,734.44 acres. The Eastern Powder River Coal Basin as defined in the Eastern Powder River Coal Basin EIS contains 26 of the outstanding coal prospecting permits including 64,252 acres, none of which are on Indian land.

Interrogatory No. 18: State how many coal prospecting permits approved by the Department of the Interior within the Northern Great Plains not giving a preference-right to coal leases are currently outstanding in the Northern Great Plains and the total acreage involved. Please provide this information separately for each agency of the Department of the Interior and for Indian lands. Please also provide this information separately for the eastern Powder River basin as that term is defined in the Eastern Powder River Environmental Impact Statement.

Answer: See answer to Interrogatory No. 17 above.

Interrogatory No. 19: State when the Department of Agriculture expects to complete the Environmental Analysis Reports on the applications for permits for rights-of-way described in paragraphs 30 of the Affidavit of Russell T. McCrory and when it expects to decide upon whether to grant or deny these applications. State what kind of project each of these applications relate to (for example, power plants or strip mines) and the site of the project (for example, megawatts of electricity or tons of coal to be mined annually).

Answer: This Interrogatory does not relate to the Department of the Interior.

Interrogatory No. 20: Since June 30, 1974, has the Department of the Interior granted any permits for rights-of-way across lands under its jurisdiction for activities relating to coal development in the Northern Great Plains? If the answer is yes, state for each permit the approximate location, the agency granting the permit, the name of the permittee, the amount of land involved, and the purpose of the permit.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. Since June 30, 1974, the Department of the Interior has through the Bureau of Land Management issued only two rights-of-way permits in the State of Wyoming, Montana, North Dakota and South Dakota. These two permits were issued by the Bureau of Land Management and are for locations outside the Northern Great Plains.

Type of Right-of-Way	Approximate Location	Name of Permittee	Purpose	Land Involved
Railroad	Tps. 22, 23, N., R. 83 W., Carbon County	Union Pacific Railroad Co.	to provide rail service to and from coal loading facilities	200 feet wide, 7.6 miles in length
Electric power line	Tps. 22, 23, N., R. 83 W., Carbon County	Pacific Power & Light Company	to provide power for coal mining operations	100 feet wide, 6.301 miles in length

Interrogatory No. 21: State how many applications for permits for rights-of-way across lands for activities relating to coal development in the Northern Great Plains are currently pending in the Department of the Interior.

Answer: For the purpose of these interrogatories, Plaintiffs have defined the "Northern Great Plains" as the "four state area of Wyoming, Montana, North Dakota, and South Dakota". The area included within that four state area is substantially broader than the "Northern Great Plains region" described in the complaint which is the subject of this litigation. In the States of Wyoming, Montana, North Dakota, and South Dakota there are 14 applications pending before the Department of the Interior for permits for rights-of-way across lands under the jurisdiction of the Department of the Interior for activities relating to coal development.

Interrogatory No. 22: Since June 30, 1974, has the Corps of Engineers approved any permits for rights-of-way across navigable rivers or for the placement of structures in navigable rivers for activities relating to coal development within the Northern Great Plains. If the answer is yes, state for each permit the approximate location, the name of the permittee, and the purpose of the permit.

Answer: This Interrogatory does not relate to the Department of the Interior.

Interrogatory No. 23: Has the time for comment on the draft interim report of the Northern Great Plains

Resource Program been extended until November 15, 1974?

Answer: The time for comment by Northern Great Plains Resource Program Participants on the draft report has been extended to November 11, 1974.

Interrogatory No. 24: Will a final report eventually be prepared for the Northern Great Plains Resource Program. If the answer is yes, state when that final report is expected to be finished and what further studies are expected to be carried out between the date of the interim report and the final report.

Answer: The final interim report is to be released by the end of February 1975. No decisions have been made concerning whether a final report will be prepared by the Northern Great Plains Resource Program and what studies in specific areas will be conducted by the appropriate Federal and State entities.

Interrogatory No. 25: Pending the completion of the interim report and, if one is to be prepared, the final report on the Northern Great Plains Resource Program, state in detail what actions, if any, will be taken with respect to pending applications for federal coal leases, prospecting permits, mining plans, rights-of-way and placement of structures within navigable rivers relating to coal development within the Northern Great Plains.

Answer: As was stated in item 16 of Secretary Morton's October 26, 1974 affidavit:

The policy of the Department with respect to resource development in the Northern Great Plains Area [not as defined by Plaintiffs for the purpose of these interrogatories] was announced in the memorandum of June 30, 1972 . . . and reasserted in the memorandum of January 24, 1973 The purpose of the policy is to insure that development does not proceed based solely on single purpose studies incapable of developing comprehensive information or by piecemeal actions which restrict future options. To fulfill that purpose the granting or

approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains Area [not as defined by Plaintiffs for the purpose of these interrogatories] will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary for review and concurrence prior to execution.

Interrogatory No. 26: State whether any federal agency contemplates the preparation of any future environmental-impact statements on a regional or subregional basis within the Northern Great Plains relating to coal development. If the answer is yes, identify the region to be covered by each statement and state the expected completion date for each statement and the agency principally involved. State also what actions, if any, the federal agencies anticipate taking with respect to coal leases, prospecting permits, mining plans, rights-of-way and placement of structures within navigable rivers within a particular region or subregion prior to completion of any impact statement on that region or subregion.

Answer: Decisions concerning the scope of future statements will be based upon information developed from such sources as the coal programmatic EIS and the NGPRP and the nature and proximity of pending and proposed projects. As stated in Secretary Morton's October 26, 1973 affidavit, "It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner." That statement still stands as the most definitive description of the Department's posture with respect to future statements. At present the four statements identified below are in various stages of development. Each of these statements will contain some re-

gional or subregional analysis. Due to the various stages of development not all of the information requested can be provided.

- a. Projected Coal Development, Crow Indian Reservation, Montana.

The Bureau of Indian Affairs has responsibility for the preparation of this statement on the probable effect of development of the reservation and ceded area coal resources of the Crow Indian Tribe. A preliminary draft is undergoing review within the Department.

- b. Montana Power Company, Colstrip Powerplant, Colstrip, Montana.

The Bureau of Land Management, which has responsibility for the preparation of this statement, has suspended preparation pending completion of studies in January 1975 by the State of Montana which has authority with respect to utility siting.

- c. Shell Oil Company Proposal to mine coal on the Crow Indian Reservation, Montana.

The Geological Survey has been assigned responsibility for the preparation of this statement. The drafting of the statement has not commenced.

- d. Proposed Wyoming-Arkansas Coal Slurry Pipeline.

The Bureau of Land Management has made preliminary plans for the preparation of the statement.

The Department of the Interior is not in a position to project what actions, if any, will be taken within a particular region or subregion prior to completion of an impact statement on that region or subregion.

Interrogatory No. 27: State whether any water has been released pursuant to the options or contracts described in the Affidavit of William W. Lyons and, if so, how

much. Please provide this information separately as to each river, stream, reservoir and lake.

Answer: No water has been released pursuant to options or contracts described in the Affidavit of William W. Lyons.

Interrogatory No. 28: State whether any applications for the release of water pursuant to the options or contracts described in the Affidavit of William W. Lyons are currently pending in the Department of the Interior and state the total amount of water involved. Please provide this information separately as to each river, stream, reservoir and lake.

Answer: There are no applications for release of water pursuant to options or contracts described in the Affidavit of William W. Lyons.

Interrogatory No. 29: Describe the expected schedule for taking action to begin the diversion of water from the Green River and the Fontenelle Reservoir pursuant to any proposed or existing contract between the United States and the State of Wyoming for which a final environmental-impact statement was issued on September 5, 1974.

Answer: The Department of the Interior does not have a schedule or an expected schedule for taking action to begin diversion of water from the Green River and the Fontenelle Reservoir.

Interrogatory No. 30: State whether a new draft environmental-impact statement will be prepared for the Federal Coal Leasing Program. If the answer is yes, state when such a new draft statement is expected to be issued. Whether the answer is yes or no, state when the final statement is expected to be issued.

Answer: The Department of the Interior has not determined whether a new draft Environmental Impact Statement on the Proposed Federal Coal Leasing Program will be prepared. The Department currently projects that the final statement will be issued in early 1975.

Interrogatory No. 31: State when the Department of the Interior expects to take action to approve or disapprove the four mining plans described in the Eastern Powder River Basin draft environmental-impact statement.

Answer: The Department of the Interior expects to be in a position to take action with respect to the four mining plans described in the Eastern Powder River Coal Basin EIS in late November or early December 1974.

Interrogatory No. 32: State when the Department of the Interior expects to take action to begin implementing the federal coal leasing program which is the subject of the draft environmental statement on the Federal Coal Leasing Program. State what actions the Department of the Interior expects to take, pursuant to the federal coal leasing program, with respect to coal leases, prospecting permits and mining plans in the Northern Great Plains, when these actions are expected to begin, and the amount of acreage likely to be involved.

Answer: The Department of the Interior cannot determine or project when it expects to take actions, or what actions it expects to take to begin implementation of the Federal coal leasing program which is the subject of the coal programmatic EIS prior to the issuance of the final statement.

Interrogatory No. 33: State the names of the witnesses who will appear on behalf of the federal defendants at the evidentiary hearing on November 6, 1974.

Answer: Oral notice of the intention of the Department of the Interior to have William W. Lyons available to be called as a witness at the November 6, 1974 hearing was given to counsel for the Plaintiffs on November 5, 1974.

Interrogatory No. 34: For each witness listed in response to Interrogatory No. 33, briefly summarize the subject matter of his testimony.

Answer: The testimony of William W. Lyons was taken at the hearing on November 6, 1974 and therefore a summary of the subject matter is not appropriate.

/s/ John C. Whitaker
Under Secretary
U. S. Department of the Interior

Subscribed and sworn to before me this 11th day of November 1974.

/s/ Sandra Gazzi
Notary Public

My Commission expires April 14, 1977

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 1974, I served a copy of the foregoing answers to plaintiffs' supplemental interrogatories upon Bruce J. Terris, Esquire, by hand delivering it to his office and I have caused copies thereof to be mailed to the following counsel for intervening defendants:

AMERICAN ELECTRIC POWER SYSTEM

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Covington & Burling
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ARKANSAS POWER & LIGHT COMPANY OKLAHOMA GAS & ELECTRIC COMPANY WISCONSIN POWER & LIGHT COMPANY

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MONTANA POWER COMPANY PORTLAND GENERAL ELECTRIC COMPANY PUGET SOUND POWER & LIGHT COMPANY WASHINGTON WATER POWER COMPANY

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ATLANTIC RICHFIELD COMPANY

Henry B. Weaver
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CITIES SERVICE GAS COMPANY

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WESTMORELAND RESOURCES

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Washington, D.C. 20006

/s/ Herbert Pittle
HERBERT PITTLE

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

Civil No. 1182-73

DEFENDANTS' RESPONSE TO PLAINTIFFS'
SUPPLEMENTAL INTERROGATORY NO. 19

City of Washington)
) ss
 District of Columbia)

JAMES P. PERRY, being duly sworn, deposes and says:

1. I am James P. Perry, General Attorney, Natural Resources Division, Office of the General Counsel, representing the United States Department of Agriculture.

2. Based on information furnished to me by the National Forest Systems Division, Forest Service, United States Department of Agriculture, I make the following response to Plaintiffs' Supplemental Interrogatory No. 19 concerning applications for permits for rights-of-way.

3. The Forest Service has administratively assigned the following target dates as goals for completing Environmental Analysis Reports (EAR) on the four applications for permits for rights-of-way, listed in the McRorey affidavit dated October 25, 1974:

Applicant	Permit Sought	Target EAR Completion Date
Wycoalgas Co.	Water transmission line right-of-way	3rd Q 1975
Rochelle Coal Co.	Conveyor belt right-of-way	3rd Q 1975
Atlantic Richfield Co.	Plant site and railroad spur right-of-way	2nd Q 1975
Rochelle Coal Co.	Railroad spur right-of-way	2nd Q 1975

The target dates represent the earliest possible completion date, assuming no delays of any kind.

The Environmental Analysis Reports require, among other things, a determination as to whether an Environmental Impact Statement is required, consequently the Forest Service has no accurate estimate concerning the date of any decisions to grant or deny the pending applications.

4. The Wycoalgas, Inc., application for a right-of-way proposes the following:

Purpose of use. The right-of-way will be used to construct and operate a pipeline to deliver water to a proposed coal gasification plant.

Improvements. The pipeline will be 22 inches in diameter with a wall thickness of 0.25 inches. The line will be welded steel and will be internally and externally coated. Cover will be a minimum of 42 inches.

Land Area. Length, 5.75 miles x width, 66 feet = 46 acres.

5. The Rochelle Coal Company application for a conveyor belt right-of-way proposes the following:

Purpose of use. The right-of-way will be used to construct and operate an overland belt conveyor between the mine site and the gasification plant. Coal will be delivered to the gasification plant and ash delivered to the mine.

Improvements. The belt conveyor will be a 60 inch wide, double decked rigid frame with a driving drum 48-54 inches in diameter. Snub pulleys and take-ups will be in the 40 inch diameter range. There will be probably four segments, possibly five, driven by 2500 H.P. electric motors, with suitable speed reducers. In addition there will be an electric power transmission line and an improved road.

Land Area. Length, 3.71 miles x width 100 feet = 45 acres.

6. The Atlantic Richfield Co. application proposes the following:

Purpose of use. To construct, operate, and maintain a coal handling and loading facility to include mine headquarters and operational area which will be used in conjunction with the adjacent coal lease leased to Atlantic Richfield Company. This land located primarily on the Thunder Basin National Grassland herein applied for will accommodate any expansion of the facility occasioned by an increase in production of coal resulting from greater customer demand.

Land area. Length, 19,000 feet x width, 300 feet = 130.85 acres which is included in the 520 acres applied for.

7. Rochelle Coal Co. application for a railroad spur right-of-way proposes the following:

Purpose of use. The right-of-way will be used to construct and operate a standard gauge railroad between the mine site and the Burlington Northern and Chicago Northwestern mainline. Coal will be delivered to the gasification plant and ash delivered to the mine.

Improvements. A standard gauge railroad track, complete with necessary dirtwork, ballast, drainage structures, and animal crossings.

Land area. Length, 1.00 mile x width, 150 feet = 18.3 acres.

/s/ James P. Perry
JAMES P. PERRY

Subscribed and sworn to before me this 12th day of November, 1974.

/s/ [Illegible]
Notary Public

My commission expires: March 16, 1973

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

AFFIDAVIT OF RUSSELL P. McROREY

City of Washington)
) ss
District of Columbia)

RUSSELL P. McROREY, being duly sworn deposes and says:

1. I, Russell P. McRorey, am Acting Deputy Chief, Forest Service, United States Department of Agriculture. In such capacity I am a staff officer to the Chief of the Forest Service and a line officer responsible to the Chief having broad program responsibilities for all National Forest System activities on the National Forests and National Grasslands. The program activities include the consideration of applications for the use of National Forest lands and resources, and the granting of permits when appropriate or forwarding Forest Service recommendations to the proper authorizing agency.

2. I have carefully reviewed the Order of the Court of Appeals for the District of Columbia in Civil Action No. 1182-73 dated October 14, 1974, remanding the record to the District Court for further evidentiary hearings. I submit the following information concerning coal-related development activities in the Northern Great Plains Region on lands under the administrative jurisdiction of the Forest Service in answer to those paragraphs of the Order of October 14, 1974, applicable to the Department of Agriculture.

3. In response to paragraph 4 of the Order regarding applications for permits for rights-of-way over lands within National Forests in the Northern Great Plains since June 30, 1974, the Forest Service has received four applications for permits relating to coal development, all on the Thunder Basin National Grasslands, Wyoming, as follows:

<u>Applicant</u>	<u>Permit Sought</u>
Wycoalgas Co.	Water transmission line right-of-way
Rochelle Coal Co.	Conveyor belt right-of-way
Atlantic Richfield Co.	Plant site and railroad spur right-of-way
Rochelle Coal Co.	Railroad spur right-of-way

No action on pending applications will be taken prior to the completion of an Environmental Analysis Report (EAR) by the Forest Service. The EAR requires a determination as to whether an Environmental Impact Statement pursuant to the National Environmental Policy Act is necessary. Until the completion of the Environmental Analysis Report, the administrative record upon which the decision would be made is incomplete and agency consideration of the application on the merits would not be possible.

4. In response to paragraph 6 of the Order concerning preparation of Environmental Impact Statements in the Northern Great Plains Region on other than individual projects, the Forest Service plans or has completed Environmental Impact Statements on the following areas:

<u>Area</u>	<u>State</u>	<u>Completion Date</u>
Badlands Planning Unit, Custer National Forest	North Dakota	August 1974
Rolling Prairie Planning Unit, Custer National Forest	North Dakota	July 1975*
Cave Hills Planning Unit, Custer National Forest	South Dakota	December 1975*
Ashland Division Land Use Plan, Custer National Forest	Montana	May 1976*
Big Horn Land Use Plan, Big Horn National Forest	Wyoming	1977*
Thunder Basin National Grassland Land Use Plan	Wyoming	1977*

*Estimate

The listed Environmental Impact Statements relate to overall land use planning pursuant to the statutory authorities of this Department for the management and administration of the National Forest and National Grasslands and concern coal and other energy development only as one of many considerations in land management.

5. In response to paragraph 7 of the Order, the Forest Service has no plans to grant water rights or water contracts in the Northern Great Plains Regional relating to coal development.

6. In response to paragraph 9 of the Order, the Forest Service has not issued any Environmental Impact Statements on individual projects relating to coal development in the Northern Great Plains Region after February 17, 1973.

/s/ Russell P. McRorey
RUSSELL P. MCROREY

Subscribed and sworn to before me this 25 day of October, 1974.

/s/ Sandra D. Foster
Notary Public

My Commission Expires 9-30-75.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1182-73

SIERRA CLUB, ET AL., PLAINTIFFS

v.

MORTON, ET AL., DEFENDANTS

AFFIDAVIT OF WILLIAM W. LYONS

City of Washington)
) ss
District of Columbia)

WILLIAM W. LYONS being duly sworn, deposes and says as follows:

I, William W. Lyons am Deputy Under Secretary of the Department of the Interior. In such official capacity I am familiar with the subject matter referred to in the October 14, 1974 Order of the United States Court of Appeals for the District of Columbia Circuit issued in docket No. 74-1389. That Order remanded the record of the above captioned action to this Court for a further evidentiary hearing and delineated nine matters on which the Court of Appeals desired to have the benefit of the District Judge's findings. The purpose of this affidavit is to specifically respond to all the questions contained in the October 14, 1974 Order, except [those] contained in item 4 which relate to matters within the jurisdiction of the Department of Agriculture and the Corps of Engineers. To facilitate coordination between the Order and this affidavit each of the matters, with the exception of number 4, is reproduced below and followed by the response.

Inquiry No. 1. Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been

issued for lands in the Northern Great Plains region since February 17, 1973?

Response: The short term coal leasing policy which was announced by Secretary Rogers C. B. Morton in the news release of February 17, 1973 and set forth in item 8 of Secretary Morton's October 26, 1973 affidavit is still in effect. The Department has not, since February 17, 1973, issued any coal leases in the area subject to this litigation.

Inquiry No. 2. Is the suspension of the issuance by the United States of coal prospecting permits announced on February 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

Response: Secretarial Order No. 2952 issued February 13, 1973, which is attached as Exhibit II to the Secretary Morton's October 26, 1973 affidavit and which directed that no coal prospecting permits should be issued, is still in effect. Pursuant to that order no coal prospecting permits have been issued since February 13, 1973.

Inquiry No. 3. To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973?

Response: The Department of the Interior has not since February 17, 1973 approved coal leasing on Indian Lands in the area subject to this litigation.

Inquiry No. 5. Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

Response: The interim report of the Northern Great Plains Resource Program (NGPRP) has not been finalized. On September 27, 1974, a draft interim report was released to the NGPRP participants for their comments. The Program Management Team is to receive those comments no later than November 1, 1974, and will revise the draft interim report where inconsistencies are noted. The revised report is to be released as the interim report by the end of February 1975. In addition to the interim report, the separate reports of each of the seven NGPRP work groups will be reproduced

and made available for public inspection at various designated locations. Subsequent to the release of the interim report the NGPRP will continue to coordinate Federal and State energy related studies. Further studies in specific areas will be conducted by the appropriate Federal and State entities.

Inquiry No. 6. Does the United States Government contemplate the preparation of any future environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

Response: Decisions concerning the scope of future statements will be based upon information developed from such sources as the coal programmatic EIS and the NGPRP and the nature and proximity of pending and proposed projects. As stated in Secretary Morton's October 26, 1973 affidavit, "It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner." That statement still stands as the most definitive description of the Departments posture with respect to future statements.¹

Inquiry No. 7. What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

Response: The following material is an update of the Supplemental answers submitted by the Department

¹ At present four statements are in various stages of development. These are entitled or concern:

- a. Projected Coal Development, Crow Indian Reservation, Montana.
- b. Montana Power Company, Colstrip Powerplant, Colstrip Montana.
- c. Shell Oil Company Proposal to mine coal on the Crow Indian Reservation, Montana.
- d. Proposed Wyoming—Arkansas Coal Slurry Pipeline.

of the Interior in response to Plaintiff's Interrogatory No. 1:

BUREAU OF RECLAMATION

In addition to the response submitted in ANSWERS OF DEFENDANT ROGERS C. B. MORTON, SECRETARY OF THE DEPARTMENT OF THE INTERIOR TO PLAINTIFFS' INTERROGATORIES, the following material is submitted:

Finalization of pending contracts may materialize and require Secretarial approval prior to resolution of this court case. The status of the four previously listed are explained below:

<u>Company</u>	<u>Quantity of Water Acre Feet</u>	<u>Source</u>	<u>Status</u>
Basin Electric	5,600	Keyhole Reservoir	Denied ²
Mobil Oil	50,000	Boysen Reservoir	Deferred ³
Atlantic Richfield	7,200	Green Mountain Reservoir	Delete from list ⁴
Carter Oil	18,000	Green Mountain Reservoir	Delete from list ⁴

The following is an update of the answers submitted by the Department of the Interior in response to Interrogatory No. 1:

Bureau of Reclamation: Between 1967 and 1971, the Bureau of Reclamation executed 16 option contracts which would allow diversion of water annually from the Big Horn River for industrial use in Wyoming and Montana (contracts are listed in Exhibit C-1). Author-

² Application denied September 26, 1973, absent applicant assurances from irrigators that part of their water entitlement under Belle Fouché Compact would be available for industrial use.

³ Status undetermined pending review of water requirements for all Indian tribes in the Upper Missouri River Basin.

⁴ Should be deleted from list, since the proposed source of water is not related to Northern Great Plains area.

ity to market an additional 135,000 acre-feet per year from the Wind River system in Wyoming was approved in 1969 (contracts executed so far listed in Exhibit C-2). Reservoirs to regulate flows of the Wind and Big Horn Rivers are part of the Pick-Sloan Missouri Basin Program and include the Yellowtail and Boysen Units.

The Bureau of Reclamation has received 12 applications (from 9 entities) for annual quantities of 502,000 acre-feet from the Yellowtail Unit, and one applicant for 9,000 acre-feet from Boysen Unit (The names of the applicants, the acre-feet required, and the dates of application are listed in Exhibit C-3). Applications have also been received for annual water needs for industrial use totaling 630,000 acre-feet from four entities to divert water from the Wind-Big Horn-Yellowstone River system; 360,000 acre-feet from seven entities to divert water from Fort Peck Reservoir, 18,000 acre-feet from one entity to divert water from Lake Tschida (Heart Butte Unit North Dakota); and 268,816 acre-feet from five entities to divert water from Lake Sakakawea (Garrison Reservoir, North Dakota) (The names of applicants, the acre-feet requested, and the dates of application are listed in Exhibit C-4).

All of these units are part of the Pick-Sloan Missouri Basin Program; some include joint responsibility with the Corps of Engineers. The Departments of the Army and the Interior are currently working to establish common marketing procedures to handle anticipated industrial water sales from mainstem reservoirs in the Missouri River Basin.

The Department of the Interior does not grant water rights. The issuance of a water right permit is solely under the jurisdiction of the individual states. Indian water rights are dealt with on an entirely separate basis.

BUREAU OF RECLAMATION

Exhibit C

Bighorn River—Executed Option Contracts

C-1

(Contract No. 14-06-600-9353, dated November 9, 1967, with Kerr-McGee Corporation, 50,000 acre-feet; Contract No. 14-06-600-9356, dated November 22, 1967, with Shell Oil Company, 28,000 acre-feet; Contract No. 14-06-600-9360, dated December 14, 1967, with Humble Oil and Refining Company, 50,000 acre-feet; Contract No. 14-06-600-9977, dated May 24, 1968, with Peabody Coal Company, 40,000 acre-feet; Contract No. 14-06-600-10, 135, dated June 19, 1969, with Reynolds Mining Corporation, 50,000 acre-feet; Contract No. 14-06-600-10, 141, dated June 20, 1969, with John S. Wold, 50,000 acre-feet; Contract No. 14-06-60028A, dated January 20, 1970, with Gulf Mineral Resources Company, 25,000 acre-feet; Contract No. 14-06-600-57A, dated March 2, 1970, with Gulf Mineral Resources Corporation, 50,000 acre-feet; Contract No. 14-06-600-101A, dated May 22, 1970, with Peabody Coal Company, 40,000 acre-feet; Contract No. 14-06-600-149A, dated September 4, 1970, with Colorado Interstate Gas Company, 30,000 acre-feet; Contract No. 14-06-600-309A, dated January 20, 1971, with American Metal Climax, Inc., 30,000 acre-feet; Contract No. 14-06-600-298A, dated January 11, 1971, with Panhandle Eastern Pipeline Company, 30,000 acre-feet; Contract No. 14-06-600-316A, dated February 10, 1971, with Shell Oil Company, 20,000 acre-feet; Contract No. 14-06-600-329A, dated July 22, 1971, with Westmoreland Associates, 30,000 acre-feet; Contract No. 14-06-600-347A, dated April 21, 1971, with Norsworthy and Feger, Inc., 50,000 acre-feet; Contract No. 14-06-600-353A, dated May 7, 1971, with Cardinal Petroleum Company, 50,000 acre-feet).

Wind River—Executed Option Contracts

C-2

One option contract, No. 14-06-600-10,169, was executed with Sun Oil Company on August 15, 1969, for 35,000 acre-feet, and a similar contract with the Mobil Oil Corporation for 50,000 acre-feet is awaiting approval by the Secretary.

Yellowtail Unit and Boysen Unit (pending applications)

C-3

In the Yellowtail Unit: Western Energy Company, dated February 1, 1968, for 35,000 acre-feet; Sun Oil Company, dated February 26, 1968, for 35,000 acre-feet; Western Energy Company, dated April 10, 1968, for 15,000 acre-feet; Wold-Jenkins Company, dated April 17, 1968, for 50,000 acre-feet; Consolidation Coal Company, dated February 27, 1970, for 30,000 acre-feet; Norsworthy & Reger, Inc., dated March 20, 1970, for 10,000 acre-feet; Ayrshire Coal Company, dated October 5, 1970, for 30,000 acre-feet; Ayrshire Coal Company, dated October 5, 1970, for 30,000 acre-feet; Ayrshire Coal Company, dated April 27, 1971, for 30,000 acre-feet; Intermountain Resources, Incorporated (Floyd L. Cardinal), dated May 14, 1971, for 92,000 acre-feet; the City of Gillette, dated June 3, 1970, for 15,000 acre-feet; and Tennessee Gas Transmission, dated October 15, 1973, for 130,000 acre-feet. In the Boysen Unit: Wyoming State Rural Electric Association, dated January 24, 1972, for 9,000 acre-feet.

Upper Missouri and Wind-Bighorn-Yellowstone Rivers
(pending applications)

C-4

In the Wind-Bighorn-Yellowstone River System: Atlantic Richfield Company, dated May 21, 1971, for 50,000 acre-feet; Pacific Power & Light Company, dated May 28, 1971, for 30,000 acre-feet; Northern Natural Gas Company, dated June 8, 1971, for 20,000 acre-feet; and

Continental Oil Company, dated October 18, 1971, for 530,000 acre-feet. In Fort Peck: Consolidated Coal Company, dated July 31, 1968, for 50,000 acre-feet; HFC Oil Company, Inc., dated December 30, 1971, for 50,000 acre-feet; John S. Wold, dated November 22, 1972, for 50,000 acre-feet; Mobil Oil Corporation, dated November 29, 1972, for 50,000 acre-feet; Getty Oil Company, dated February 28, 1973, for 50,000 acre-feet; Wesco, dated August 21, 1973, for 60,000 acre-feet; and Phillips Petroleum Company, dated April 17, 1974, for 50,000 acre-feet. In Lake Tschida (Heart Butte Unit—North Dakota): Peabody Coal Company, dated December 27, 1971, for 18,000 acre-feet. From Lake Sakakawea: Mobil Oil Corporation, dated April 19, 1973, for 50,000 acre-feet; and Basin Electric, dated January 31, 1974, for 9,000 acre-feet. In addition, the following petitions have been filed with the North Dakota State Engineer: Michigan-Wisconsin Pipeline Company, dated January 18, 1973, for 375,000 acre-feet, reduced to 68,000 acre-feet by the State Water Commission; El Paso Natural Gas Company, dated April 2, 1974, for 71,816 acre-feet; and Natural Gas Pipeline Company of America, dated April 17, 1974, for 70,000 acre-feet.

Inquiry No. 8. How was the area to be covered by the EIS for the development of coal resources in the Eastern Power River Coal Basin defined, and how was it determined that an EIS was appropriate for that area?

Response: The appropriateness of the Eastern Powder River Coal Basin EIS and the definition of the area covered were determined as a result of consultations among the Department of Agriculture, the Department of the Interior and the Interstate Commerce Commission. That EIS embraces applications for approval of mining plans and necessary rights of way submitted by the Atlantic Richfield Company, the Carter Oil Company, the Kerr-McGee Corporation, and the Wyodak Resources Development Corporation, and an application to the ICC for construction of a railroad line submitted by the Burlington-Northern, Inc. and the Chicago and Northwestern Transportation Company. The manner in

which the area covered by the EIS was determined is explained in the following paragraphs from the preface of the statement.

The four federal agencies have determined that approval of the pending applications would collectively constitute a major federal action having a significant effect on the quality of human environment. Therefore, the agencies have determined that to protect the public interests most effectively and to meet their individual responsibilities under the National Environmental Policy Act of 1969 most efficiently, they should jointly undertake the preparation of a single environmental impact statement which would consider not only the impacts of the several proposals but also the collective, cumulative impacts, primary and secondary, of the development of the coal resources in the area.

Further, to meet the intent of the Act in the most productive fashion, it is necessary to examine the general geographic area of the proposed and potential actions. The geographic area for basic consideration is that part of the Powder River Coal Basin in Wyoming lying generally eastward from the Powder River to the outcrop line of the coal resource and from somewhat north of Gillette to a point somewhat south of Douglas. The area delination is based in part on present and anticipated levels of mining activity, differing quality of the coal resource, different physical arrangement of the coal beds, somewhat different mining techniques required and differing physical reclamation requirements. Those considerations having a broader scope of geographic impact such as social conditions, economic factors, atmospheric influence, water resources, and recreation uses are treated on a larger regional basis than the primary study area. This statement discusses the existing environment, evaluates the collective impact of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area described above. This statement also examines in detail certain pro-

posed activities for which federal actions are required.

Inquiry No. 9. Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after February 17, 1973, or prepared for projects that were commenced after that time—

- a. Provide one or more representative statements.
- b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area?
- c. Do the statements take into account the ecological setting created by private action in the area?
- d. Has the government devised any procedure for cross-referencing among the individual statements?

Response: a. The following statements, which constitute the statements prepared for proposals within the area subject to this litigation, are submitted:

1. Crow Ceded Area Coal Lease, Westmoreland Resources Mining Proposal (This statement is the subject of pending litigation *Redding v. Morton*, 74-1984, United States Court of Appeals for the Ninth Circuit. A copy of the District Court opinion has already been provided.)
2. Proposed Plan of Mining and Reclamation, Big Sky Mine, Peabody Coal Company Coal Lease M-15965, Colstrip Montana.
3. Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming.

b, c, & d. The statements identified above discuss all the impacts on the existing environment. The description of the existing environment contained in the statements reflects impacts from other private and governmental actions. Thus cumulative impacts are assessed and the ecological setting created by private action in the area is taking into account. In addition the Eastern Powder River Coal Basin EIS contains parts relating to each of five different proposals and a separate part consist-

ing of a regional analysis of broad cumulative impacts on the environment of coal resource development in the Eastern Powder River Coal Basin. That statement thus cross-references among individual proposals. Cross-referencing in future statements will be utilized where necessary to describe the existing environment which could be impacted by proposed actions.

/s/ [Illegible]
Deputy Under Secretary

Subscribed and sworn to before me this _____
day of October 1974.

Notary Public

AFFIDAVIT OF THOMAS S. KLEPPE

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

Thomas S. Kleppe, being duly sworn, deposes and says as follows:

1. I, Thomas S. Kleppe, am the Secretary of the Interior. As the principal official of the Department of the Interior I am responsible for supervising all of its functions.

2. As the Secretary of the Interior I have been delegated general authority to manage the public lands of the United States. 43 U.S.C. §§ 2, 1201; 1457 (Supp. 1972). It is also my responsibility to provide for the orderly development of the mineral resources of the United States, 30 U.S.C. § 181 *et seq.*, including in particular development of the nation's coal resources. 30 U.S.C. §§ 201-209. To fulfill these responsibilities the Department has broad authority to issue coal leases and coal prospecting permits for federal lands (including lands with respect to which the United States has conveyed surface interests but has reserved an interest in the underlying mineral resources), and to approve, disapprove or condition exploration and mining plans submitted by private companies. The Department's jurisdiction over federal lands includes the responsibility to decide whether to enter into options and contracts for the sale and delivery of water and to issue right-of-way permits and special use permits for transmission lines, plant sites, access roads and other uses; these responsibilities often bear importantly on coal development activities respecting federal lands. The Department also has authority to approve coal leases and prospecting permits for Indian lands.

3. It is the responsibility of the Secretary of the Interior, under the Mining and Minerals Policy Act of 1970, to carry out the policy of the Federal Government, to foster and encourage a healthy domestic privately

owned minerals industry. Recent international incidents threatening the security and availability of non-domestic energy supplies have led to Presidentially established goals of reduced dependency on costly and oftentimes unreliable foreign imports. These goals have amplified the demand for domestic coal production and use. Since the oil embargo of 1973, world prices have quadrupled, and the impact is felt throughout our economy. In October, 1974, and again in April, 1975, the President announced a major commitment to increase development and use of our domestic energy, of which coal is our most abundant resource. The Secretary of the Interior has been directed by the President to take actions to insure rapid production from existing leases and to make new, low sulfur coal supplies available. If the nation is to achieve energy self-sufficiency, domestic coal resources, which represent approximately 94 percent of the nation's identified primary energy resources, must be developed. Although coal represents 94 percent of our energy resources, it presently supplies a mere 17 percent of domestic energy consumption. Only in recent years has the country's production of coal approached the peak reached in 1947. The self-sufficiency goals established by the President contemplate the doubling of that production in the next ten years. A total of 250 new coal mines will have to be opened during this period, each averaging 3 million tons per year. By 1985, 70 percent of domestic coal production must come from mines that do not now exist. Substantial lead time is required to increase coal production and that precious lead time is being lost with each passing day. The coal industry, now capitalized at approximately \$4 billion, will face capital requirements as high as \$15 billion by 1985.

4. The Department has significant responsibilities relating to environmental protection. It recognizes its continuing obligation under the National Environmental Policy Act of 1969 (NEPA) to ensure, to the fullest extent possible, that environmental considerations and values are taken into account in Department decision making. The Interior Department's consistent policy is to carefully weigh environmental considerations in exer-

cising its land and resource management responsibilities with respect to the nation's coal resources.

5. To ensure that there is, from the outset, thorough consideration of all factors related to new coal resource development, including performance standards, diligence requirements as well as environmental control, the Department has instituted nationwide policies and internal management controls, including the following:

- (a) On February 13, 1973, then Secretary of the Interior, Rogers C. B. Morton, issued Departmental Order No. 2952 (Exhibit 1). That Order announced that the Department would not issue coal prospecting permits anywhere in the nation pending the preparation of a national program providing for the orderly development of coal resources underlying the public lands of the United States. Order 2952 is still in effect.
- (b) On February 17, 1973, Secretary Morton announced the Department's interim coal leasing policy (Exhibit 2) which restricts substantially the issuance of coal leases throughout the United States. Under the Department's continuing coal leasing policy, coal leases may be issued only under the following conditions:
 - When coal is needed now to maintain an existing mining operation; or when coal is needed as a resource for production in the near future; and
 - when the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and
 - when an environmental impact statement covering the lease has been prepared under the National Environmental Policy Act.

This policy remains in effect pending adoption of a new policy as discussed in paragraph number 10 hereafter.

- (c) In April 1973, Secretary Morton affirmed the application of the Department's coal leasing policy to mineral leasing on Indian lands (Exhibit 3).
- (d) On September 5, 1975, the Department published new performance standards for surface coal mining on all public and acquired lands of the United States and Indian lands administered by the Department of the Interior. 40 Fed. Reg. 41122. The purpose of these regulations, which include stringent provisions for reclamation, is to protect and preserve the natural environment.

6. The Department has also initiated or participated in a variety of interdisciplinary studies relating to energy resources, their development and use to ensure that decisions which the Department may be called upon to make in the exercise of its management responsibilities will be informed, consistent with both development and environmental responsibilities, and in accord with all aspects of the public interest. Such studies have embraced a number of different geographic areas. They include:

- (a) The North Central Power Study, a study initiated in 1970 to investigate the potential for coordinated development of electric power in the north central United States. The geographic scope of the study included all or portions of twelve states and minor portions of three other states. The North Central Power Study was terminated in 1972, after responses to the Phase I report of the study indicated the inappropriateness of a coordinated plan for development of electric power in the North Central United States.
- (b) The Northern Great Plains Resources Program (NGPRP), a resource study, was initiated June 30, 1972 and conducted with the cooperation of the Federal Government, State governments, industry, environmental groups, and interested members of the public. The area under study includes portions of Montana, Wyoming, North

Dakota, South Dakota, and Nebraska. The principal purpose of the study is to provide an analytical and informational framework for policy and planning decisions at all levels in the Northern Great Plains. On June 23, 1975, NGPRP issued a report entitled "The Effects of Coal Development in the Northern Great Plains." The study, which is the culmination of the joint efforts of the States of Montana, Nebraska, North Dakota, South Dakota, Wyoming, Environmental Protection Agency, Department of Agriculture and Department of Interior, provides data and addresses possible development alternatives for the area, including issues relating to regional geology, mineral resources, water supply and quality, air quality, surface resources, social, economic and cultural aspects, and national energy considerations. The study effort is not a proposal for federal action nor does it recommend or propose a development plan for the area.

Resource studies of the type here described are one of many analytical tools employed by the Department to inform itself as to general resource availability, resource need and general environmental considerations so that it can intelligently determine the scope of environmental analysis and review specific actions it may take. Simply put, resource studies are a prelude to informed agency planning and provide the data base on which the Department may decide to take specific actions for which impact statements are prepared. The scope of environmental impact statements seldom coincide with that of a given resource study, since the statements evolve from specific proposals for federal action while the studies simply provide an educational backdrop.

7. The Department is in the process of modifying the general regulations which currently constitute the Department's national coal leasing policies. 30 C.F.R. Part 211; 43 C.F.R. Part 23, 43 C.F.R. 3041.

8. A final Environmental Impact Statement covering the Department's proposed actions was released on September 19, 1975. The impact statement entitled, Final

Environmental Impact Statement Proposed Federal Coal Leasing Program is frequently referred to as the "Coal Programmatic EIS."

9. In addition to the nationwide internal management policies which the Department has established to ensure that any coal development must be accompanied by careful consideration of environmental considerations, the studies which it has initiated or participated in, and the environmental impact statement which has been prepared and is now issued covering the Department's national coal leasing program, the Department prepares environmental impact statements pursuant to NEPA covering lease issuances, mining plans, and other coal related proposals submitted by private companies as well as on competitive leases or mining plans when proposed by the Department when Department action on the proposals constitutes "major federal action." Under this policy, several impact statements have been prepared for proposals within the States of Montana and Wyoming:

- (a) Crow Ceded Area Coal Lease, Westmoreland Resources Mining Proposal. This EIS, which was submitted to the President's Council on Environmental Quality in January 1974, covers a single mining plan covering five years and 770 acres in Montana. That statement was found to be adequate by the Ninth Circuit in *Cady v. Morton*, No. 74-1987 (9th Cir. 1975), although that Court in its decision of June 19, 1975, has directed the lower court to declare the issuance of the leases upon which the mining plan was based as being a major federal action requiring the preparation of an EIS.
- (b) Proposed Plan of Mining and Reclamation, Big Sky Mine, Peabody Coal Company Coal Lease M-15965, Colstrip, Montana. This EIS, which was submitted to the President's Council on Environmental Quality on March 7, 1974, covers one lease in Montana. The adequacy of this EIS has not been challenged.

- (c) Final Environmental Impact Statement, Eastern Powder River Coal Basin of Wyoming. This EIS, which was prepared by the Departments of Agriculture, Commerce, and Interior, was submitted to the President's Council on Environmental Quality on October 18, 1974. The EIS, which consists of six volumes totalling nearly 1,000 pages, is an analysis of the individual and cumulative impacts on the environment of proposed and potential coal development in the Eastern Powder River Coal Basin; it also analyzes the specific impact of mining plans submitted to the Department by Atlantic Richfield Company, Carter Oil Co., Kerr-McGee Coal Co., Wyodak Resources Development Corp., and a railroad right-of-way requested by Burlington Northern Inc. The adequacy of this EIS has not been challenged.
- (d) Final environmental impact statement entitled "Proposed Plan of Mining and Reclamation—Belle Ayr South Mine, Amax Coal Company, coal lease W-0317682, Campbell County, Wyoming". The draft of this EIS was published by the Department of the Interior in March, 1975 and copies were delivered to this court and served upon counsel for appellants. In delivering such draft to this court and to opposing counsel, the Department acted in the interest of informing all parties concerned of certain Departmental actions being taken in the Eastern Powder River Coal Basin, Wyoming. It was under no legal compulsion to do so inasmuch as the injunction of January 3, 1975, did not include this particular mining plan. A final version of the impact statement was published by the Department on October 7, 1975. As of the date of this affidavit, the adequacy of this final EIS has not been challenged.

10. In addition to the foregoing, the Department is in the process of preparing or is commencing to prepare

environmental impact statements for other regions similar to those above. In each case, as in those listed above, the decision to prepare the statement is based on a definable proposal or proposals for federal action.

- (a) On June 26, 1975, the Secretary ordered that a regional EIS be prepared for the area of Sweetwater County, Wyoming. The regional EIS will be supported by individual plans for each lease or combination of leases and mining plans as appropriate.
- (b) On September 25, 1975, the Secretary ordered that a regional EIS be prepared for the Powder River Basin, Montana. The statement will cover all of Powder River County and portions of Custer and Rosebud Counties. This regional EIS will be supported by individual statements for each lease or combination of leases and mining plans as appropriate.

11. The Department's policy with regard to the scope and preparation of coal related environmental impact statements has been that articulated by Secretary Morton in an affidavit filed in connection with this litigation on October 26, 1973:

It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available may indicate that statements on smaller subregions, geologic structures, basins, or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner.

In adopting a current policy with regard to coal leasing which will assure environmental protection to the maximum extent practicable, the Department has determined that, whenever possible, several proposals for federal actions in the same region will be covered by a single environmental impact statement rather than by multiple statements. In such cases, the region covered, as distinguished from a "province", will be determined by

basin boundaries, drainage areas, areas of economic interdependence and other relevant, identifiable factors. In all cases, each coal lease, prospecting permit, preference right lease application or mining plan will be analyzed to determine whether or not an EIS is warranted. An environmental analysis will be prepared prior to issuing any competitive or noncompetitive lease, prospecting permit or mining plan approval. If the analysis concludes that the action will have a significant effect on the human environment, as is most often the case, an EIS will be prepared unless a previous statement has sufficiently analyzed the impacts of the proposed specific action.

12. In order to meet its responsibilities under the statutes relating to federal lands and resources and to follow the dictates of NEPA, the Department has the authority and responsibility to exercise its expertise in determining the need for, the scope and timing of environmental impact statements covering proposals for federal actions. Decisions on the scope and timing of a statement must take into account myriads of complex factors including the degree to which a proposal has developed and to which it can be defined, its relationship, if any, to other proposed or potential actions and the Department's assessment of the adequacy of the knowledge and data it possesses in relation to a proposal. Decisions relating to a statement require knowledge of the evolving plans and programs of the state and local governments and of private parties and the relationship of such plans to a proposal and knowledge of related legislation which could significantly impact a proposal. These decisions require an expertise gained slowly through experience and education and obtained at high cost in both money and man hours. To require the Department to decide on an impact statement, as the Court does, where there is no plan or proposal for federal action, is to require that it ignore its authority, ignore its expertise and proceed as an uninformed speculator filled with dreams and guesses. The Department does not have a plan or program to develop or contribute to the development or to control the development of coal

resources in the Northern Great Plains, the Rocky Mountain area, Appalachia, or in any other "region" or "province", as such, in the country.

13. With respect to the proposed plan of mining and reclamation for the Belle Ayr South mine identified in paragraph 9(d) above, this Department will be in a position to act 30 days after final publication of the statement and the filing of the same with the Council on Environmental Quality, that is to say, on or about November 7, 1975. The Department has been in a position to act on the mining plans identified in paragraph 9(c) above, for more than nine months. After issuance of the Eastern Powder River Basin final impact statement on October 18, 1974, it initially delayed action because the Order of the United States Court of Appeals for the District of Columbia Circuit dated June 17, 1974, cautioned that "substantial restraint" be exercised by the Department while that Court was considering this litigation. Subsequently, the Department was enjoined from taking any action on the mining plans and railroad right-of-way covered in the six volume Eastern Powder River Coal Basin EIS by an Order of the Court dated January 3, 1975. On that same date, without knowledge of the injunction, the Under Secretary of the Interior took action to approve the plans and right-of-way which action was rescinded on January 9 when the effect of the Order became known. The Court's decision of June 16, 1975, entered one year after the Court agreed to give the case expedited consideration, continues that injunction.

14. Prompt action on the four mining plans identified in paragraph 9(c) above, as to which this Court has already entered its injunction, is necessary because the low sulfur coal which they will yield will be needed in the near future by electrical utilities and other major energy consumers. As a result, such coal can be burned without violation of applicable Federal and State air pollution requirements and without resort to expensive sulfur removal devices of unproven reliability. The Federal Energy Administration has already ordered 74 power plants owned by 25 utility companies to convert from gas to

coal. 40 Fed. Reg. 28430 (July 3, 1975). In addition, the FEA has ordered that 41 companies building new power plants must have coal-burning capability. The orders affect plants in 23 states.

15. Amax Coal Company's Belle Ayr South mine is a current operation employing over 100 individuals. (See affidavit of W. Hollie Hopper attached hereto and marked Exhibit 4). It has mined or is mining approximately 160 acres of federal and private coal land at Belle Ayr South. 1974 production of approximately 3.3 million tons of coal is estimated to increase to 5 million tons in 1975 with peak production of 15 million tons per year in 1977 through 1996 ending with 14 million tons production in 1997. The mining plan, as proposed, would require that Amax initiate and complete a program of reclamation and revegetation of the mined areas which would meet the standards of federal and Wyoming State law and would be accomplished progressively as the mining operation proceeds. As noted in the final EIS, at full production, a strip of land embracing approximately 126 acres will be mined each year (page 13) and the mining strips will be the subject of an ongoing reclamation and revegetation program.

The affidavit of W. Hollie Hopper reveals that: (a) Amax Coal Company presently has contractual commitments to supply tens of millions of tons of coal from this mine during the years 1976, 1977, and 1978; (b) substantially all of this coal is destined for delivery to public utilities under long-term supply contracts; (c) for those customers scheduled to receive coal deliveries in 1976, alternative sources of supply will, in all probability, be impossible to obtain, and (d) disruption of this particular operation and deprivation of these markets of this unique coal source inevitably will result in service curtailment to millions of customers and innumerable industries will face the loss of power sources. The twelve affidavits attached to Exhibit 4 tell the reader a story of new generating plants, on order and under construction, designed especially to accommodate the unique low sulfur and burning qualities of this coal, a story of permits obtained and huge amounts of capital expended

in reliance on this coal, a story of the inability of the utilities to meet the basic energy needs of millions of people without this coal.

16. Two new dimensions have been added to this situation: a serious shortage in natural gas supplies and the escalated cost of fuel oil. The coal from the sources which are the subject of this affidavit is unique in its burning characteristics and it can be and, in the case of Amax Coal Company, is being made available to meet new, urgent needs. The availability of fuel oil to these utilities to meet their increased demands is tenuous at best. The record shows that the substantial volumes of fuel oil needed to offset the loss of coal resulting from the injunction against these mines would probably be unavailable. Even if it were possible to obtain such volumes, they could now be obtained only at substantial cost increases and those increased volumes would continue to be subject to the vagaries of Middle East politics and the unpredictable pricing policies of the Organization of Petroleum Exporting Countries. Another factor affecting the availability and use of fuel oil is that utility use of both middle distillate and residual fuel oil is regulated by the Federal Energy Administration. Under that agency's mandatory allocation program, utility use of middle distillate fuel oil is restricted to that quantity consumed in 1972; although not so severely restricted, utility use of residual fuel oil is determined in part on the ability of the utility to use coal.

17. I am prepared to act favorably on the four mining plans subject to the present injunction, several of which were filed with the Department more than two years ago. The Department has reviewed these mining plans exhaustively. Appropriate officials have been ordered to take all steps short of actual approval of the plans and rights-of-way. Their environmental impact has been carefully assessed in individual environmental impact statements. Favorable action on these mining plans would not commit the Department to the approval of other mining plans or other coal related development proposals in the Northern Great Plains. I am convinced that their prompt approval subject to the inclusion of

environmental stipulations, is in the public interest. I am equally convinced that we have reached the point where further delay will seriously threaten the national interest.

Further, it is imperative that a prompt decision be made on the proposed plan of mining and reclamation for the Belle Ayr South mine. This mine is making and is capable of making even greater contributions to the energy needs of this country. The welfare of a vast portion of this nation will be affected if I am precluded from making a decision on the merits. I intend making such a decision promptly after the 30 day period following October 7, 1975, the date upon which the final impact statement was published, unless restrained by an order of a court of competent jurisdiction.

/s/ Thomas S. Kleppe
Secretary of the Interior

Subscribed and sworn to before me this 28 day of Oct. 1975.

/s/ Marilyn D. Army
Notary Public

My commission expires 8/14/78.

UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

[SEAL]

February 13, 1973

ORDER NO. 2952

Subject: Issuance of Prospecting Permits for Coal

In the exercise of my discretionary authority under section 2(b) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(b)), I have decided not to issue prospecting permits for coal under that section until further notice and to reject pending applications for such permits in order to allow the preparation of a program for the more orderly development of coal resources upon the public lands of the United States under the Mineral Leasing Act, with proper regard for the protection of the environment.

Accordingly, no prospecting permits for coal under section 2(b) of the Mineral Leasing Act, *supra*, shall be issued until further notice. All pending applications for such permits shall be rejected, and any applications submitted in the future shall be promptly rejected.

Nothing in this memorandum shall be deemed to restrict the rights of holders of prospecting permits, issued prior to this directive, to obtain preference right coal leases under section 2(b), *supra*, or to prevent the issuance of competitive coal leases under section 2(a) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(a)).

I have determined that the issuance of this order is not such a major Federal action significantly affecting the quality of the human environment as to require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)).

/s/ Rogers C. B. Morton
Secretary of the Interior

DEPARTMENT OF THE INTERIOR

news release

OFFICE OF THE SECRETARY

For Release February 17, 1973

SECRETARY MORTON ANNOUNCES NEW
COAL LEASING POLICY

A two-pronged coal leasing policy—aimed at helping to satisfy energy needs while respecting the integrity of the environment—was announced today by Secretary of the Interior Rogers C. B. Morton.

The new coal policy hinges on a series of short-term and long-term actions, which, the Secretary said, "will be made with clear recognition that there is growing need for low-sulfur coal to supply the Nation's needs for clean energy." He further stated:

"Coal is one of the most abundant energy resources. Most of the low-sulfur coal reserves of the U. S.—about 85 percent—are located on public lands in the West within the regulatory jurisdiction of the Interior Department. We must make increasing use of this resource. At the same time we must assure that development is carefully controlled to avoid environmental mistakes of the past and to keep our planning options open."

Secretary Morton said, the new coal leasing policy will operate in conformity with what he termed the Department's "overriding goals." These are three, he stated, describing them as follows:

- (1) to assure maximum environmental protection.
- (2) to provide for orderly and timely resource development, and
- (3) to assure a fair market value return for resources sold.

He also outlined steps he would take "to resolve the apparent conflict between the need to develop the resource and the need to protect the environment." The

short-term applicaion of controls would be effected as follows:

Coal leases will be issued only under the following conditions:

- When coal is needed now to maintain an existing mining operation; or
- When coal is needed as a reserve for production in the near future; and
- When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and
- When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act.

Secretary Morton further stipulated that all pending and future applications for prospecting permits would be henceforth rejected until a thorough analysis of the current supply/demand situation can be made and more comprehensive planning of resource use can be accomplished.

"This short-term leasing policy is intended to insure that current coal production can continue," the Interior head stated. "It will prevent deficiencies in supplies of coal which are necessary to meet our continuing energy needs."

Long range aspects of the Secretary's leasing policy provide for:

- Development of an environmental impact statement on the Department's entire coal leasing program, supplementing this as necessary for appropriate impact reporting on a regional basis or for individual leases.
- Development of a planning system to determine the size, timing, and location of future coal leases in order to meet energy needs most effectively.

"The long-range aspects of the new leasing policy will combine a sound approach to development with an environmental ethic that will become the core of philosophy of Interior as a Department of Natural Resources," Secretary Morton said. "Wherever regulations need to be revised to put teeth into this approach, that will be accomplished with all the speed we can muster."

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UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

[SEAL]

Apr. 13, 1973

Memorandum

To: Assistant Secretary for Congressional & Public Affairs

From: Acting Secretary of the Interior
(Sgd) John C. Whitaker

Subject: Department policy regarding mineral leasing of Indian lands

During my recent testimony before the Senate Interior and Insular Affairs Committee I was requested to submit a statement of Department policy regarding mineral leasing of Indian lands. The following statement sets forth that policy.

The policy of the Department of the Interior is to approve mineral leasing on Indian lands where:

- (a) the tribal or individual Indian landowner desires to dispose of the minerals;
- (b) the terms and conditions of the lease are in the best interest of the Indian landowner; and
- (c) appropriate environmental safeguards are imposed on the lessee, including satisfaction of the requirements of NEPA.

AFFIDAVIT OF FRANK G. ZARB

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

FRANK G. ZARB, being duly sworn, deposes and says as follows:

1. I, FRANK G. ZARB, am Administrator of the Federal Energy Administration (FEA). I am also Executive Director of the Energy Resources Council, which insures communication and coordination among federal agencies in the formulation and implementation of national energy policy. I previously held the position of Associate Director, Science, Energy and Natural Resources, Office of Management and Budget.

2. The Federal Energy Administration was established by the Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761, *et seq.* Under this authority, the Administrator is given a number of specific responsibilities, including the duty to:

(1) advise the President and the Congress with respect to the establishment of a comprehensive national energy policy in relation to the energy matters for which the Administration has responsibility, and, in coordination with the Secretary of State, the integration of domestic and foreign policies relating to energy resource management;

(2) assess the adequacy of energy resources to meet demands in the immediate and longer range future for all sectors of the economy and for the general public; [and]

. . .

(9) collect, evaluate, assemble, and analyze energy information on reserves, production, demand, and related economic data.

This affidavit is submitted for the limited purpose of assisting the Court in an evaluation of the role played by increased coal production in meeting our national energy needs.

3. Until the early 1950's, United States demand for energy did not exceed this country's ability to produce energy from available domestic resources. Since that time, however, a combination of accelerating demand, dwindling domestic reserves of relatively cheaply recoverable petroleum and natural gas and air pollution considerations has caused the United States to develop a growing dependence on imported petroleum and petroleum products. By mid-1973, the United States had become dependent on imported crude oil and petroleum products for about 35 percent of its total petroleum consumption. This percentage, moreover, rose to about 38 percent by early 1975. At the same time, crude oil production in the United States has been declining and increases in natural gas consumption has been exceeding new domestic discoveries. As for the production of coal, which can be used in substitution of petroleum products and natural gas in some processes and of which the United States possesses abundant reserves, recent annual production levels are only slightly above the levels extant in the 1940's. As these various circumstances converged, there was another event which served to dramatize this Nation's need to bring its domestic consumption and production levels into line and to achieve relative energy independence. That event was, of course, the embargo imposed by Arab oil-producing countries upon exports of crude oil and petroleum products to the United States.

4. In response to this state of affairs and pursuant to the responsibilities delegated to the Administrator and the agency under the Federal Energy Administration Act, the FEA initiated Project Independence in March, 1974, to evaluate our serious energy problems and to provide a framework for developing a national energy policy. The *Project Independence Blueprint*, which was released in November, 1974, underscored the fact that the United States cannot continue to depend upon insecure supplies of foreign oil to meet its energy demands and made clear the need for a national energy policy to avert the potentially serious consequences to our economy of another oil embargo in the future. To reach a higher level of energy self-sufficiency in the near term and, in

time, relative energy independence, the *Blueprint* recognized the ample coal resources this Nation has and the vital part they must play if the objectives of Project Independence are to be met. See *Final Report of the Inter-agency Coal Task Force, Project Independence Blueprint*.

5. Congress also recognized the importance of our coal resources in achieving energy independence when it passed the Energy Supply and Environmental Coordination Act of 1974. (P.L. 93-319) Under that Act, authority was given to FEA to undertake a number of energy conservation and supply measures, including the authority to prohibit certain powerplants and major fuel burning installations from burning natural gas or petroleum products as their primary energy source and to require that powerplants in the early planning process be designed and constructed so as to be capable of using coal as their primary energy source. In addition, Congress presently has pending before it an extension of this authority.

6. The United States has almost 53 percent of the free world's coal resources, and domestic coal reserves comprise approximately 85 percent of U.S. fossil fuel resources. Despite this abundance, however, including large deposits of low sulphur coal in the West, coal has gradually declined in importance as a major fuel. Today coal accounts for only 17.2 percent of our energy consumption. In 1974 only 601 million tons of bituminous coal and lignite were mined, an amount less than was mined 30 years ago.

7. If the United States is to achieve a reasonable degree of energy self-sufficiency, coal production will roughly have to double over the next decade. Our goal is production of slightly more than a billion tons of coal annually by 1985—the equivalent of opening a million and a half ton mine every week for the next ten years. The President's program contemplates the opening of 250 major new mines over the next ten years. The annual production forecasted in the *Project Independence Blueprint* for the Northern Great Plains region is as follows:

1975	48,100 (thousand short tons)
1977	65,750
1980	101,600
1985	155,100

To the extent that there is any delay in reaching such production levels through orderly and responsible development of our coal reserves, however, our efforts toward energy independence will be inhibited.

8. To achieve necessary increases in coal production to meet national goals, prompt federal decisions on additional coal development are essential. Estimates in late 1974 placed the capital requirement for new coal production and transportation facilities at \$15.4 billion over the next ten years. In order to raise this capital, prospective coal producers need a sufficient element of certainty to be able to enter into long-term supply contracts with electric utilities or other purchasers. Further, from a decision to proceed ahead, it still takes approximately three years to open a large surface mine and five years to open an underground mine. Thus, it is crucial to this Nation's energy objectives that the Federal Government have the latitude necessary to effectuate systematic and responsible development of our critical coal resources.

/s/ Frank G. Zarb
FRANK G. ZARB
Administrator

Subscribed and sworn to before me this 28th day of October, 1975.

/s/ Thomas H. Kemp
THOMAS H. KEMP
Notary Public

My commission expires September 14, 1979

SUPREME COURT OF THE UNITED STATES

No. 3. 75-552 and 75-561

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL., and

AMERICAN ELECTRIC POWER SYSTEM, ET AL.

v.

SIERRA CLUB, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 12, 1976

Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Cases consolidated and a total of one hour allotted for oral argument. Application for stay of the injunction entered by the United States Court of Appeals for the District of Columbia Circuit on January 3, 1975, and continued on June 16, 1975, presented to the Chief Justice and by him referred to the Court, granted pending final disposition of these cases.

Supreme Court, U. S.
FILED

DEC 3 1975

WILLIAM RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

BRUCE J. TERRIS,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,
v.
SIERRA CLUB, ET AL.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,
v.
SIERRA CLUB, ET AL.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-73A) is reported at 514 F.2d 856. The order of the court of appeals of June 17, 1974, denying respondents'

motion for injunction pending appeal (Resp. App. A, pp. 1a-3a, *infra*) is not reported. The order of the court of appeals of January 3, 1975, granting a temporary injunction pending appeal (Pet. App. B, pp. 75A-80A) is reported at 509 F.2d 533. The order of the court of appeals of November 7, 1975, denying the federal petitioners' motion to dissolve the temporary injunction (Resp. App. B, pp. 4a-5a, *infra*), is not reported. The order of the court of appeals remanding the case to the district court for supplemental findings (Pet. App. C, pp. 81A-83A) is not reported.

The opinion of the district court (Pet. App. D, pp. 85A-101A), its supplemental findings of fact (Pet. App. E, pp. 103A-116A), and its order of November 14, 1975, granting respondents' motion to modify the temporary injunction (Resp. App. C, pp. 6a-7a, *infra*), are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F, pp. 117A-118A) was entered on June 16, 1975. By order dated September 3, 1975, Mr. Justice Rehnquist extended the time for the federal petitioners to file a petition for a writ of certiorari to and including October 10, 1975. By order dated September 9, 1975, Mr. Justice White extended the time for the American Electric Power System *et al.* (hereafter "the power company petitioners") to file their petition for a writ of certiorari to and including October 10, 1975. The petitions for writs of certiorari were filed on October 9 and 10, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") permits federal agencies to take numerous major federal actions related to the massive development

of coal resources in the Northern Great Plains without first preparing and considering a regional environmental impact statement related to the cumulative environmental impacts of federal actions within the entire region.

2. Whether this case is in a proper posture for review by this Court since the court of appeals has made an interlocutory decision remanding the case to the district court for further proceedings to determine issues of both fact and law.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, is set forth in the federal (p. 3) and power company (p. 3) petitions.

STATEMENT

Respondents brought suit on June 13, 1972, in the District Court for the District of Columbia seeking a declaratory judgment, mandamus and injunctive relief against the federal petitioners relating to the development and exploitation of the vast coal reserves of the Fort Union and Powder River formations located in eastern Montana, northeastern Wyoming, western North Dakota and western South Dakota—the Northern Great Plains region. The federal actions which respondents sought to enjoin include issuing, granting or approving coal prospecting and exploitation permits, coal mining leases and mining plans, water options and contracts, diversions of water from and placement of structures in navigable waterways and permits for rights-of-way.

The federal petitioners have already taken numerous actions related to coal development in the Northern Great Plains region. Fourteen federal coal leases, issued prior to the effective date of NEPA, are currently being strip-mined under federally approved mining plans. Pet. App.

A, p. 5A, note 4. Since January 1, 1970, when NEPA took effect, 29 additional coal leases, covering 137,802 acres, have been issued, 97 prospecting permits (which convey the right to obtain leases) covering 685,280 acres have been granted, and water-option contracts for 601,000 acre-feet of water per year have been issued. Answers of Secretary Morton to Plaintiffs' Interrogatories, Exhibit C, App. 49-50; Supplemental Answers of Secretary Morton, App. 149-156; Exhibit 1 to Federal Defendants' Motion for Summary Judgment, App. 173-188. Five mining plans which authorize strip-mining have also been approved. Pet. App. A, p. 10A, note 13.¹

Meanwhile, the federal petitioners have received applications for approval of 16 other mining plans. *Id.* at 10A-11A. The Secretary of the Interior has announced that he would approve four of these mining plans for four additional mines in northeastern Wyoming if he were not presently enjoined from doing so. Affidavit of Thomas S. Kleppe, para. 14, attached to petitioners' Application for a Stay Pending Review on Writ of Certiorari. The federal defendants also have pending 42 competitive lease applications, 82 preference right leases, 19 applications for coal-related rights-of-way, 41 applications for water option contracts, and two applications for permits for structures in navigable rivers. Pet. App. A, pp. 8A-9A, including notes 7, 8 and 9, 12A-13A.

Respondents claimed that the federal petitioners had violated in the past, and were continuing to violate, Sections 102(2)(A), (C) and (D), 42 U.S.C. 4332(2)(A), (C) and (D), of NEPA by taking these actions related to coal development in the Northern Great Plains region without preparing and considering a regional environmental impact statement, systematic interdisciplinary

¹ In addition to the mining plan approvals mentioned in the court of appeals' opinion, the Secretary of Interior approved the Amax mine in northeastern Wyoming in November 1975.

studies and a study of appropriate alternatives concerning the cumulative environmental impacts of the numerous federal actions relating to coal development in this area. Respondents contended that the environmental impacts of the massive coal development in the Northern Great Plains would be enormous. Presently, the Northern Great Plains region is a largely uninhabited agrarian region with majestic unspoiled vistas, large isolated areas devoted to ranching or recreational uses, and abundant wildlife. The projected development of the region's coal resources will permanently destroy much of the region's environment by converting it into a major industrial complex. The large strip mines, mine-mouth electric and coal gasification plants, railroads, aqueducts, transmission lines and other installations related to this coal development will cause an enormous, adverse impact on land use, water supply, water and air quality, wildlife, aesthetics and other elements of the environment.

For example, it has been variously estimated that the land to be stripmined for this coal development will cover from 30 square miles per year—or a total of more than 1000 square miles during the development's projected 35-year duration—to more than 3000 square miles in northeastern Wyoming alone. The record below contained documents which show that no strip-mined land has yet been fully reclaimed and that the region's climate, scarce water supply, and thin topsoil make it extremely unlikely that any of it will be successfully reclaimed. Montana Coal Task Force, Coal Development in Eastern Montana, p. 33 (1973); Melcher, Review and Analysis of Phase I Report of North Central Power Study, pp. 12, 20-21 (1972); Montana Environmental Quality Council, First Annual Report, p. 143 (1972). A federal inter-agency task force has stated that "acceptable reclamation of these semi-arid lands has yet to be demonstrated." Sulfur Oxide Control Technology Assessment Panel, Final Re-

port on Projected Utilization of Stack Gas Cleaning Systems by Steam-Electric Plants, p. 69 (April 1973). The Bureau of Land Management has recognized the adverse environmental impacts of this coal development in just the Powder River basin in Wyoming (Bureau of Land Management, Burlington-Northern Inc. Environmental Analysis Record: Proposed Railroad, Douglas to Gillette Wyoming (August 1973) pp. 2, 5, 7-8):

About 21 billion tons [of coal] are strippable with 16 billion tons being on the east side of the basin in what is known as the Wyodak zone. This Wyodak zone outcrops and extends south for approximately 90 miles from a point about 20 miles north of Gillette which if developed for coal can result in a total disturbance in excess of 200,000 acres.

.

This procedure of [strip] mining will totally disrupt the existing ecosystem. Rehabilitation of this type of practice will not approach restoration.

.

The resultant boom with its enormous population pressures may cause more human resource problems than the ecological damage of strip mining itself.

.

C. Adverse Impacts That Cannot Be Avoided:

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The Overall Impact: The total impact of enabling the proposed railroad line for coal development will transform large areas of the Powder River Basin into an abnormal, imbalanced ecosystem. Both plant and animal species, in disturbed areas will be either eradicated completely, displaced, or temporarily eliminated. Air and water quality will be lowered by material carried in suspension. The visual and noise pollution will continue until the energy resources are depleted. It is doubtful that the human

impact as mentioned under impacts can be completely mitigated.

Moreover, toxic mining spoils threaten to pollute ground water supplies and the removal of coal formations which have served as the area's principal aquifers threatens to reduce the supply of ground water significantly. Montana Environmental Quality Council, First Annual Report, *supra*, pp. 143-144.

The irreparable environmental damage to the region is well-summarized by the court of appeals (Pet. App. A, p. 3A):

In addition to the obvious environmental effects of strip-mining acres of now-fertile land, development would also affect the region's water supply and quality, air quality, wildlife, population distribution and composition, and economic structure. These effects would be caused not only by the mines themselves, but by the power plants, coal gasification plants, railroads, aqueducts, pumping plants, reservoirs, dams, and new housing that would necessarily accompany the strip mines.

On February 14, 1974, the district court granted the motions of the federal and power company petitioners for summary judgment. It concluded, *inter alia*, that since the federal petitioners had decided not to develop a regional program or plan for their numerous actions related to development of the coal resources in the Northern Great Plains, NEPA did not require that they prepare a regional environmental impact statement. Pet. App. D, pp. 98A-99A.

On June 17, 1974, the court of appeals denied the respondents' motion for an injunction pending appeal because the requested injunction was too broad. However, the court noted that "the spectre of significant harm to large tracts of valuable wilderness still remains" and

urged that the federal petitioners exercise "substantial restraint" in approving coal development activity in the Northern Great Plains while the appeal was pending. Resp. App. A, pp. 2a-3a, *infra*.

After a *sua sponte* remand to the district court for the record to be updated and certain factual questions answered (Pet. App. C, pp. 81A-83A; Pet. App. E, pp. 103A-116A), the court of appeals heard oral argument on December 17, 1974. On January 3, 1975, it granted respondents' motion for a limited injunction to prevent the imminent approval of four mining plans and railroad rights-of-way. Pet. App. B, pp. 75A-80A.

On June 16, 1975, the court of appeals issued its decision on the merits of the case. The court held that the federal petitioners, by exercising their power to approve leases, mining plans, rights-of-way and water options, were attempting to control development of coal resources in the Northern Great Plains which constituted major federal action within the meaning of NEPA (Pet. App. A, p. 39A). However, as to the proper timing for a regional impact statement, it remanded the case to the district court for the federal petitioners to decide whether such a statement would be prepared and to apply a four-factor balancing test in deciding whether the time was ripe for a statement. *Id.* at 43A-44A. At the same time, the court of appeals continued the temporary injunction of January 3, 1975, in order to "preserve, in large part, the *status quo*" pending the federal petitioners' decision whether to prepare a regional environmental statement. *Id.* at 50A-51A.

On November 7, 1975, the court of appeals denied the motions of the federal and power company petitioners to dissolve the temporary injunction and, at the same time, remanded to the district court respondents' motion to modify that injunction in order to prevent approval of

the mining plan for the Amax mine in the Eastern Powder River Coal Basin. Resp. App. A, pp. 4a-5a, *infra*. On November 11, 1975, the Secretary of Interior decided that the Amax mining plan should be approved. On November 14, 1975, the district court enjoined that approval insofar as it extended beyond a period of two years or the final resolution of this litigation. Resp. App. C, pp. 6a-7a, *infra*.

ARGUMENT

Since this case involves massive development of coal resources in a large area of four states, there can be no question that it is of substantial importance. However, the interlocutory nature of the court of appeals' decision and narrow legal issues that are presented make this case inappropriate for review by this Court at the present time. Rather, the problems of energy development and environmental protection which are presented here can be resolved most expeditiously if the case is allowed to proceed on remand to the district court, as contemplated by the court of appeals. Pet. App. A, pp. 44A, 47A-50A.

1. The federal petitioners' contention that the decision of the court below is in conflict with *SCRAP v. United States*, 422 U.S. 289 (1975) ("SCRAP II"), is based on obvious and serious misstatements of the holding of the court of appeals. In *SCRAP II*, this Court held that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal actions" (emphasis in original). The federal petitioners' claim that the decision below is in conflict with *SCRAP II* rests upon their repeated characterization (Pet. 11, 14, 15, 17, 18, 19) of that decision as holding that preparation of an environmental impact statement is required whenever federal officials are merely "contemplating" certain action

and that a statement "must precede" a proposal for major federal action.

In fact, the court of appeals held (Pet. App. A, p. 42A):

We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus we think it proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe. * * * We should note, however, that the "ripeness" necessary before a statement is required is slight. *Preparation of a statement must precede, or at least accompany, preparation of the recommendation of report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action.* (emphasis added).

Subsequently, the court reaffirmed its holding: "[A]s we have made clear, a comprehensive EIS *should accompany* the proposal for action * * *" (emphasis added). *Id.* at 48A. Thus, the court of appeals' ruling is based directly on the requirement of Section 102(2)(C) of NEPA that an environmental impact statement be prepared to "accompany the proposal [for major federal action] through the existing agency review processes." 42 U.S.C. 4332 (2)(C). It is also obviously consistent, indeed almost identical, with the holding of this Court in SCRAP II that an environmental statement must be prepared when the agency "makes a recommendation or report on a *proposal* for federal action."

Moreover, the issue of whether, in the circumstances of the present case, the time is yet "ripe" for a re-

gional impact statement to be required was not decided by the court of appeals. Instead, it was specifically left open to be resolved upon remand, first by the federal petitioners and, if they decide not to prepare a statement, by the district court. The district court was directed to consider four factors (Pet. App. A, p. 43A):

How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?

These four factors relate directly to this Court's holding in SCRAP II that the kind and timing of an environmental impact statement depends on the circumstances of a particular case.

Furthermore, the facts in this case are significantly different than those in SCRAP II. This case arises in the midst of a large number of federal actions concerning coal development in the Northern Great Plains region. Many federal approvals of coal leases, prospecting permits, mining plans, water options and rights-of-way have already been made and numerous additional applications are currently awaiting federal action. The federal petitioners have already prepared numerous studies and reports attempting to control development of coal resources in the Northern Great Plains. See Pet. 5-6; Pet. App. A, pp. 5A-7A. These studies culminated most recently in the Interim Report of the Northern Great Plains Resource Program (hereafter NGPRP Report),² a federal-state inter-agency study begun in June 1972 and designed "to coordinate on-going activity and build a policy

² Respondents are lodging the report with this Court.

framework which might help guide resource management decisions in the future." *Id.* at 6A.

2. The federal petitioners claim (Pet. 16-17) that there is a conflict among the circuits concerning the issue of appropriate scope for an environmental impact statement. The weakness of petitioners' claim of conflict is reflected by the fact that they cite six separate cases but do not discuss any in sufficient detail to show whether a conflict actually exists. We submit, on the contrary, that a careful reading of these cases and of other cases involving the appropriate scope of an environmental statement will show that all of these cases, like the decision below, depend on their particular facts.

For example, the federal petitioners claim a conflict between the decision below and *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378 (C.A. 2, 1975). However, in that case the court rejected an environmental statement as inadequate because it did not contain certain comprehensive analysis. The court below cited another Second Circuit decision which supports the principle of comprehensive environmental statements. *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F.2d 927 (1974), vacated and remanded for reconsideration, — U.S. —, No. 74-1413. Even more recently, the Second Circuit has again held an environmental statement invalid because of its limited scope. *Natural Resources Defense Council v. Callaway*, — F.2d —, 8 ERC 1273 (1975). Thus, the Second Circuit cases all support the decision of the court below and certainly do not conflict with it.

Petitioners cite three Ninth Circuit cases, *Daly v. Volpe*, 514 F.2d 1106 (1975), *Friends of the Earth v. Coleman*, 518 F.2d 323 (1975), and *Trout Unlimited v. Morton*, 509 F.2d 1376 (1974), where the Ninth Circuit ruled that broad environmental statements

were not required and approved statements covering only individual phases of larger projects. However, more recently, in *Cady v. Morton*, — F.2d —, 8 ERC 1097, 1101-1102 (1975), the Ninth Circuit required a broad, lease-wide impact statement and rejected a single mining plan statement as inadequate in scope. These cases, where the same Circuit has held that a broader environmental impact statement is or is not required, show clearly that this determination depends largely on the particular facts of a case.

Moreover, the decisions which petitioners cite show even in isolation how much they depend on their own particular facts. *Trout Unlimited v. Morton*, *supra*, and *Sierra Club v. Callaway*, 499 F.2d 982 (C.A. 5, 1974), depend heavily on the fact that Congress had separately approved and authorized funding for each project at issue in those cases. In *Sierra Club v. Stamm*, 507 F.2d 788 (C.A. 10, 1974), the court did not require a broader environmental statement because the overall project would not be completed until sometime in the next century and there was a clear commitment to prepare environmental statements on other components of that project. On the other hand, in *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (C.A. 8, 1973), the court of appeals required the preparation of an environmental statement broader in scope than that which the federal agency had prepared although narrower than the plaintiffs desired. The particularized nature of a determination concerning the proper scope of an environmental statement was pointed out by this Court in SCRAP II, *supra*: "In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken."

Even if it could be said that there was a conflict between the legal principles in the decision below and cases in other circuits, such a conflict would be inappropriate

for resolution at this time. As we will discuss, the decision below is interlocutory and will require detailed findings of fact on remand to apply the principles laid down by the court of appeals to the facts of this case. Until the legal principles are applied to the facts, it is impossible to ascertain whether the decision below is in conflict with any other case.

Moreover, any alleged conflict of circuits is of little importance for future cases in view of the determination of the Department of the Interior to prepare regional environmental statements in the future. The federal petitioners have recently acknowledged that regional environmental impact statements are necessary in order "to look at both specific individual actions and their cumulative impacts." Statement of George L. Turcott, Assistant Director, Bureau of Land Management, Hearings on the Administration of the National Environmental Policy Act of 1969 before the Subcommittee on Fisheries, Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess., September 8, 1975, p. 9. To "illustrate the possible use of regional program EIS," Mr. Turcott stated (*id.* at 8):

There are many existing and proposed energy-related projects in the three-State area of Montana, North Dakota, and South Dakota. These include coal mining, coal gasification, power plants, water developments, transportation systems, pipelines, and transmission lines. These projects, to the extent Federal actions are involved, must meet NEPA requirements for environmental assessment and EISs.

3. The federal petitioners entirely ignore the fact that the decision of the court below is squarely based on the positions of the principal environmental agencies of the federal government. Both the Council on Environmental Quality and Environmental Protection Agency have con-

cluded that a regional environmental statement for the Northern Great Plains is needed for responsible decision-making and is required by NEPA.

The Guidelines of the Council on Environmental Quality provide (40 C.F.R. 1500.6(d)(1)) that "broad, program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases) * * *." On December 28, 1973, a memorandum from the Chairman of the Council on Environmental Quality described how the Department of Interior was violating the National Environmental Policy Act concerning coal development in the Northern Great Plains region in numerous respects and stated that "the important requirements for adequate environmental analysis" required, *inter alia* (Addendum A to Appellants' Reply Brief in the court of appeals, p. A-5):

Preparation of a draft "coal development program environmental impact statement" encompassing the regional and secondary impacts of coal development on Federal and Indian lands in the Northern Great Plains.

On January 15, 1974, the Chairman of the Council sent that memorandum to the Secretary of Interior with his own letter which stated (*id.*, p. A-1):

An extensive amount of coal is already committed for development—in the form of outstanding leases and pending applications for preference right leases—and the Council believes that this pending development must be given timely and careful examination, as required by NEPA.

Just recently, in a "Memorandum to the Heads of Agencies" dated November 26, 1975, the Chairman of the Council on Environmental Quality explained this Court's decision in SCRAP II and pointed out (p. 4):

Agencies which sponsor incremental actions with cumulative significant impacts (e.g., individual coal leases or highway segments) should continue the practice of preparing program statements covering the cumulative environmental effects of the broader programs, as prescribed in Sec. 1500.5 of CEQ's Guidelines.

The Environmental Protection Agency has likewise concluded that the National Environmental Policy Act requires preparation of a comprehensive environmental impact statement before federal actions can be taken concerning coal development of the Northern Great Plains region. In identical letters to Secretaries Morton and Butz, the Administrator of EPA stated (App. 82; Pet. App. A, p. 37A, note 28):

Environmental impact statements prepared on a project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and spirit of the National Environmental Policy Act.

4. The federal petitioners rely on the fact that a number of environmental impact statements have been prepared relating to the coal development in the Northern Great Plains. However, as the court of appeals pointed out (Pet. App. A, pp. 10A-11A, note 15), no claim has ever been made in this case that any of these statements even purports to analyze the cumulative environmental impacts of coal development in the region of the Great Plains.

The Coal Programmatic Impact Statement (see Pet. 4 and note 1), which considers federal leasing policy for the entire country, analyzes only coal leasing and none

of the other federal actions—prospecting permits, rights-of-way, water options, etc.—related to coal development. The Eastern Powder River Coal Basin environmental statement (see Pet. 8) considered only four mining plans and railroad rights-of-way in a portion of northern Wyoming. Neither environmental statement even purports to be a regional analysis of the total effects of, and alternatives to, coal development.

Consequently, the federal petitioners specifically told the court of appeals that both of these statements were irrelevant to the present case. When the federal petitioners lodged these draft statements in the court of appeals, the court asked the federal petitioners to explain their significance to this litigation. Letter of Robert A. Bonner, Chief Deputy Clerk to Edmund B. Clark, Department of Justice, September 13, 1974. The government replied (Supplemental Memorandum of the Federal Appellees, September 27, 1974):

We call the Court's attention only to the existence of these draft impact statements. Because *the contents of the statements are not relevant*, there is nothing missing from the statements that could be relevant in any respect to this case. (emphasis added)

Contrary to the claim of the federal petitioners (Pet. 7), they have not prepared environmental statements on all major federal actions relating to coal development in the Northern Great Plains. On the contrary, there have been at least 29 federal coal leases issued in the region since January 1, 1970, and not a single environmental statement has been prepared. This failure is a plain violation of NEPA. See *Cady v. Morton*, *supra*, 8 ERC at 1100. Not a single environmental statement has been prepared on any of the 97 prospecting permits or the numerous water-option contracts which conveyed rights

to hundreds of thousands of acre feet of water in federal reservoirs to private companies. The few other environmental statements relating to the region have involved individual mining plans.

None of the basic regional issues underlying the past and proposed federal actions concerning coal development in the Northern Great Plains has ever been analyzed in any environmental impact statement:

(1) whether low heat-value western coal is cheaper or more expensive when delivered to utilities in the mid-west and other areas than higher heat-value midwestern and eastern coal;

(2) whether strip mining and energy-production facilities should be allowed throughout the Northern Great Plains region or should be concentrated in one or a few areas within the region in order to limit the area of environmental harm;

(3) whether strip mining should be restricted to areas in the region where the chances of reclamation are best;

(4) whether it is feasible to deep mine the coal in the region;

(5) whether conversion to electricity or gas should be done within the region or the coal should be transported to the place of use;

(6) whether transportation of coal out of the region is preferable by railroad or slurry pipeline; and

(7) how scarce water supplies should be allocated between agriculture, fish and wildlife, various kinds of energy developers and other users.

Moreover, none of these environmental statements considers the cumulative impact of development. This impact may be drastically different than the impact of a

single project considered in isolation. As the NGPRP Report said (p. 117):

Is the impact of two mines or power plants in the same area twice as great as the impact of one, is it larger, or is it smaller?

* * *

It is quite possible that the impacts resulting from the assumed coal development profiles in the NGP may be greater than the projection and analytic techniques used have been able to delineate.

The court of appeals suggested two other situations where the cumulative environmental impacts would be significantly different (Pet. App. A, p. 38A, note 28):

To cite two examples beyond those suggested above, the availability of water and manpower in the Region is limited. Coal mining is crucially dependent upon both. Thus development of one mine is considerably more than an irretrievable commitment to that mine. In the case of water supply, it forecloses the possibility of another, environmentally preferable mine. In the case of manpower, it creates pressure for a population influx which, while minor for one mine, may be cumulatively considerable.

5. The federal petitioners claim (Pet. 18-19) that they have complete discretion to determine the appropriate region for the preparation of an environmental impact statement and the exercise of this discretion should be overturned only if arbitrary, capricious, or an abuse of discretion. They then claim that the environmental impact statement on the Eastern Powder River Coal Basin was an appropriate area on which to do a regional statement. However, as we have noted, the federal petitioners informed the court of appeals that the Eastern Powder River statement was unrelated to the issues in this case. They clearly cannot claim for the first time in this Court that the Eastern Powder River state-

ment constitutes a regional statement meeting the requirements of the court of appeals. Even if they can make this contention at such a late date, it raises complicated issues of fact which should be initially resolved by the courts below.³

The federal petitioners also suggest (Pet. 19, note 17) that the region described by the court of appeals was chosen by the respondents. This suggestion is simply frivolous. The area described in the complaint is the physical area encompassed by the Fort Union and Powder River coal formations and was taken from documents of the federal petitioners themselves. This area had been repeatedly described, prior to the filing of the complaint, by the Administrator of EPA and the Secretaries of Interior and Agriculture as the appropriate region for federal studies. Pet. App. A, pp. 35A-38A. Subsequently, the federal petitioners' own detailed study of the coal development, the NGPRP Report, covered 63 counties in northwestern Wyoming, eastern Montana, and the western Dakotas (p. 3 and Plates A-3, B-4, B-5 and B-6), the exact same area described in the complaint. Thus, whatever dispute might arise in some other case concerning the appropriate area for a regional statement, there can be no dispute that the identical region described in the complaint, the court of appeals' opinion and the federal petitioners' own documents is the appropriate one here.

6. As the federal petitioners correctly observe (Pet. 10, note 12), the court of appeals' decision here is interlocutory and does not constitute a final resolution of the

³ We further note that even if, after resolution of the issues of fact, the Eastern Powder River statement was held to constitute an adequate regional statement, it obviously cannot justify proceeding with any federal decisions in the other areas of the Northern Great Plains in Montana, the Dakotas and even parts of northeastern Wyoming outside the Eastern Powder River Coal Basin.

legal and factual issues in this case. Instead, the court of appeals found that it was unclear whether the time was ripe for a regional environmental statement to be required under NEPA (Pet. App. A, pp. 47A-48A) and remanded that issue to the district court for the federal petitioners to decide whether they would prepare such a statement and what the federal role in region would be (*id.* at 48A-50A). If the government decides not to prepare a statement, the district court will then decide whether, under the general standards laid down by the court of appeals (*id.* at 43A), the time is ripe for requiring a regional environmental statement under NEPA (*id.* at 44A). This determination will presumably be made after the parties have had an opportunity to supplement the existing factual record concerning matters which have occurred since the case was last before the district court in the fall of 1974. Thus, a final judgment on the merits of this case has not been reached but awaits action by the government and further findings by the district court.

The present case clearly falls within this Court's rule that a case which has been remanded by the court of appeals is "not yet ripe for review." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R.*, 389 U.S. 327, 328 (1967). In the absence of some exceptional reason, this Court will not usually grant a petition for a writ of certiorari to review a non-final judgment. Stern and Gressman, *Supreme Court Practice*, Sec. 4.19, p. 180 (4 ed. 1969). Thus, in *American Construction Co. v. Jacksonville T. & K.R. Co.*, 148 U.S. 372, 384 (1893), the Court ruled that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Similarly, in *Hanover-Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-

409 (1916), the Court held that such a lack of finality "of itself alone furnished sufficient ground for denial" of a petition for a writ of certiorari. See also *Hamilton Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251 (1916).

We submit that petitioners have failed to show that this case meets any of these criteria for interlocutory review. They have shown no "exceptional reason" nor any "extraordinary inconvenience" which requires that the decision of the court of appeals be reviewed at this time rather than allowing the case to proceed upon remand to the district court.

Respondents agree with the federal petitioners (Pet. 21) that "[i]t is not necessary to suspend development of coal resources [in the Northern Great Plains] for several years." However, we submit that the expeditious resolution of this case depends entirely upon the federal petitioners' own actions. Despite acknowledging the need for comprehensive regional analysis since 1972 (see pp. 15-16, *supra*), they have delayed in preparing such studies and have continually relied upon legal arguments to avoid this requirement.

The Interim Report of the NGPRP constitutes a substantial basis for preparing a regional environmental impact statement. If the federal petitioners begin today to prepare a regional statement on the basis of that report, it would probably be completed as soon as, or almost as soon as, this Court reaches a decision on the merits. Consequently, such a statement would not only provide the best possible assurance that federal actions will protect the environment of the region as far as possible, but also would not significantly delay the federal petitioners' decisions concerning development of the region.*

* The preparation of a regional impact statement has recently been urged by the governors of Montana, Wyoming, North Dakota, South Dakota and six other western states, who compose the West-

We therefore submit that the public interest will best be served if certiorari is denied so that the federal petitioners turn their attention to the detailed regional analysis which they themselves have often admitted is essential.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

BRUCE J. TERRIS,
SUELLEN T. KEINER,
Attorneys for Respondents

DECEMBER 1975

ern Governors' Regional Energy Policy Office. On October 29, 1975, they unanimously adopted a resolution (Resp. App. D, pp. 8a-9a, *infra*) which urges all parties to the present litigation to reach a negotiated settlement that would include, *inter alia*, preparation of a "comprehensive regional plan for energy development in the Northern Great Plains" by the federal petitioners. The governors also urged that the court of appeals' temporary injunction be continued to prevent federal activities in the region until such a plan is completed.

APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civil Action No. 1182-73

No. 74-1389

SIERRA CLUB ET AL.,

Appellants

v.

ROGERS C. B. MORTON, SECRETARY OF THE
UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

Before Tamm and Leventhal, Circuit Judges

ORDER

This case is before the Court on appellants' motion for an injunction pending appeal and for expedited hearing, and the responses thereto.

Federal appellees are responsible for the issuance of coal prospecting permits and coal mining leases, the approval of strip mining plans and the granting of water options and right-of-way over federal lands and waterways (hereinafter referred to collectively as "coal development activities"). Appellants' complaint sought a declaratory judgment that federal appellees are violating Section 102(2) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2), by authorizing coal development activities in an area appellants denominate the "Northern Great Plains Region" without first preparing and considering a comprehensive state-

ment of the cumulative environmental impact of appellees' actions as a whole on that Region. The complaint also prayed for an injunction against any further actions by appellees in furtherance of coal development in that Region until such a comprehensive environmental impact statement was prepared. As defined by appellants, the "Northern Great Plains Region" is comprised of eastern Montana, northeastern Wyoming and the western portions of the Dakotas.

On February 28, 1974, the District Court granted summary judgment and judgment on the pleadings in favor of federal appellees and intervening appellees and an appeal was noticed. Appellants' motion for an injunction pending appeal was denied by the District Court on March 26, and is now renewed before this Court. It appears that appellants seek an injunction as broad in scope as that requested in the complaint below, i.e., a stay of all actions by the federal appellees authorizing any coal development activity in the "Northern Great Plains Region."

The papers before this Court are ambiguous or silent as to certain dispositive facts, such as the exact nature of the various environmental studies pending before the federal appellees, whether those studies have been issued, what actions will be taken by the federal appellees before completion of those studies, whether any applications for coal development activities are now before the appellees, and when such applications may be approved. Without adequate knowledge of these facts, we are reluctant at this time to grant the broad injunctive relief requested by the appellants.

Despite this uncertainty, the spectre of significant harm to large tracts of valuable wilderness still remains. We are concerned lest the federal appellees approve applications for coal development activity in the "Northern

Great Plains Region" allowing consequential and perhaps irreversible action to be taken before this appeal is decided. The validity of any such approval turns on an issue of substantial public importance presented by this appeal, i.e., whether a comprehensive environmental impact statement, encompassing all of the federal appellees' actions relating to coal development activity in that Region is presently required. To the extent that these appellees consummate any such action pending the appeal, our jurisdiction to decide that issue as to those actions may be defeated.

The Court accordingly urges that substantial restraint be exercised in the granting of authority for coal development activity pending a disposition of this case on its merits.

The motion to expedite appeal is granted to the extent that the case will be set for hearing on the September calendar of the court. Counsel shall agree to, and submit to the court, a briefing schedule which provides for the filing of final briefs no later than August 20, 1974.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civil Action No. 1182-73

No. 74-1389

SIERRA CLUB ET AL.,
Appellants

v.

ROGERS C. B. MORTON, SECRETARY OF THE
UNITED STATES DEPARTMENT OF INTERIOR, ET AL.Before: BAZELON, Chief Judge, and WRIGHT and MAC-
KINNON, Circuit Judges

ORDER

On consideration of appellants' motion to modify the temporary injunction filed January 3, 1975, and the cross-motions of the federal and intervening appellees to dissolve that injunction, it is

ORDERED by the court that appellants' motion to modify the injunction is hereby remanded to the District Court for consideration and disposition. *See Sierra Club v. Morton*, — U.S.App.D.C. —, —, 514 F.2d 856, 883 (1975).

It is FURTHER ORDERED by the court that the cross-motions of the federal and intervening appellees to dissolve the injunction are hereby denied.

Per Curiam

For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1182-73

[Filed Nov. 14, 1975, James F. Davey, Clerk]

SIERRA CLUB, *et al.*,
Plaintiffs,

v.

ROGERS C. B. MORTON, *et al.*,
Defendants.

ORDER

This matter came before the Court pursuant to the Order of the Court of Appeals, dated November 7, 1975, remanding to this Court, for consideration and disposition, plaintiff-appellants' motion to modify the temporary injunction issued by the Court of Appeals on January 3, 1975, as well as on plaintiffs' motion for a temporary restraining order. In view of the Court of Appeals' existing injunction and it appearing to the Court from the pleadings and affidavits submitted by the parties that plaintiff-appellants' motion to modify the injunction should be granted to the extent indicated below, it is hereby

ORDERED:

(1) That, plaintiff-appellants' motion for a temporary restraining order is hereby denied;

(2) That, plaintiff-appellants' motion to modify the injunction of January 3, 1975, is hereby granted in that:

(a) The surface-mining operations of intervenor-defendant Amax Inc. are enjoined from continuing on fed-

eral lands, pursuant to the mining and reclamation plan for the Belle Ayr South mine approved by the federal defendants on November 11, 1975, for more than a period of two years commencing from the date of this order or until such time as a final decision on the merits of this case is rendered and it is otherwise decreed, subject to such terms and conditions as may be provided therein.

(b) During the period set forth in subparagraph (a) above, intervenor-defendant Amax Inc. may proceed with surface-mining operations at the Belle Ayr South mine pursuant to the federally approved mining and reclamation plan but is restrained from mining more than approximately 126 acres of land each year.

(c) The Secretary of the Interior is hereby enjoined from permitting surface-mining operations on federal coal lands pursuant to the mining and reclamation plan for the Belle Ayr South mine of Amax Inc., approved by the Secretary on November 11, 1975, beyond the period set forth in subparagraph (a) above.

SO ORDERED.

/s/ June L. Green
JUNE L. GREEN
United States District Judge

Nov. 14, 1975

Date

APPENDIX D

PUBLIC POLICY RESOLUTION 75-17

Albuquerque, New Mexico October 29, 1975

URGING NEGOTIATION OF ISSUES IN LAWSUIT
OF SIERRA CLUB v. MORTON

WHEREAS, the Western Governors' Regional Energy Policy Office favors the orderly development of the region's energy resources as being in the best interests of the nation and our states; and

WHEREAS, such orderly development requires a comprehensive regional plan developed by the federal and state governments working as full and equal partners; and

WHEREAS, the potential judicial review of *Sierra Club v. Morton* will entail unnecessary procedural delays that may well never produce a coherent comprehensive regional plan; and

WHEREAS, limited development of our coal resources, in conjunction with the development of a comprehensive regional plan, will permit the nation's need for coal to be met while adequately protecting the environment, economy, and quality of life of our region and its citizens.

NOW, THEREFORE, BE IT RESOLVED that the Western Governors' Regional Energy Policy Office strongly urges all the parties of record to the lawsuit resolve it by negotiation, provided that any negotiated settlement include the following provisions:

1. The Department of Interior will initiate a comprehensive regional plan for energy development in the Northern Great Plains, including the states as equal partners in the development of such plan;

2. The parties agree to a continuation of the present injunction and the Department of Interior's policy of restraint until the comprehensive regional plan is completed, except in limited areas to be designated by the parties to the lawsuit, subject to approval by the governor of the state in which the area is located, or, if the governor of a state so requires, subject to compliance with state plant siting and reclamation laws by all energy developers within the designated areas;

3. Within the designated areas, energy development may proceed without regard to the injunction provided that it is done in compliance with federal and state laws, including any required site-specific environmental impact statements.

(This resolution is respectfully submitted to the Secretary of Interior of the United States and to the Sierra Club.)

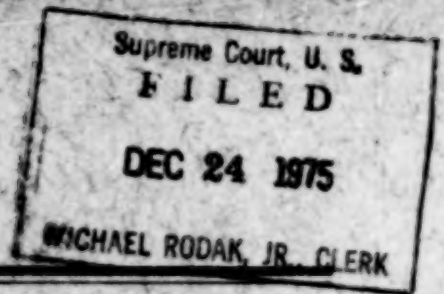
Proposed by the State of Wyoming.

Adopted unanimously.

Western Governors' Regional Energy Policy Office, Inc.

Jerry Apodaca, Governor of New Mexico
Chairperson of the Board

No. 75-552



In the Supreme Court of the United States
OCTOBER TERM, 1975

**THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS**

v.

SIERRA CLUB, INC., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY MEMORANDUM FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

SIERRA CLUB, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents argue that the court of appeals' decision is interlocutory, making review at this time inappropriate. As we discussed at Pet. 10, n. 12, the decision is interlocutory in the sense that the court of appeals remanded for further proceedings. We submit, however, that review in the present posture is both appropriate and necessary.

First, the decision settles all of the legal questions in the case, reserving to the district court only questions of timing, so long as the government continues to desire to approve mining in the region respondents have selected. See Pet. App. 45A-50A. Any other outcome could come about, the court held, only if "contrary to expectations" (Pet. App. 48A) the government either ceased contemplating coal development or settled upon "no role at all" (*ibid.*). Second, the decision is sufficiently "final"

that the court of appeals issued an injunction against approval of any mining plans in the Eastern Powder River Basin (Pet. App. 50A), and, at respondents' behest, a district court has issued an injunction with respect to a mining plan already approved by the Secretary of the Interior (Br. in Opp. App. 6a-7a). These injunctions demonstrate that the court of appeals' decision has considerable present effect and that it "will almost certainly lead to repeated appeals, injunctions, and threats of both over an extended period of time" (Pet. 13) unless reviewed by this Court.¹ Third, under any interpretation of the court of appeals' decision, the issues concerning the power of a court to enjoin an officer who has not yet violated NEPA (see Pet. 17-18) are ripe for decision now. Indeed, they will never be ripe at any other time.

2. Respondents assert (Br. in Opp. 22) that if the government began immediately to prepare the impact statement they contend is required "it would probably be completed as soon as, or almost as soon as, this Court reaches a decision on the merits." This assertion is incorrect. Respondents have argued (Br. in Opp. 18) that massive

¹The need for prompt review is enhanced by the fact that the government is now faced with inconsistent directives from different courts. As we discussed in the petition (Pet. 7), the government has declared a moratorium on the issuance of most new leases and the approval of most mining plans. The court of appeals praised this action (Pet. App. 5A-8A), indicated that it should be made absolute (*id.* at 11A-12A), called for further restraint (*id.* 51A-52A), and issued an injunction against certain federal action (*id.* at 50A). But in *American Nuclear Corp. v. Kleppe*, D. Wyo., No. C-74-72, appeal pending, C.A. 10, the court held that the entire moratorium is illegal because it has an adverse economic effect on mining interests and was declared without the preparation of an impact statement. The government now is under a directive from one court to defer action and from another court to go forward.

new studies are needed—studies that would take several years to plan and carry out. The *National Impact Statement*, which analyzed environmental effects in less depth than respondents apparently demand of a regional impact statement, was ordered to be prepared in June 1972, announced to the public in February 1973, and completed in September 1975, a total of more than three years.

In order to prepare a statement for the region selected by respondents, it would be necessary initially to define the extent and nature of the "proposal" before environmental analysis could begin: analysis of all possible outcomes and infinite permutations is unavailing. The *National Impact Statement* indicated, however, that coal decisions will be made mine-by-mine (or perhaps local area by local area). There is no proposal or program with respect to the Northern Great Plains (see Pet. 19-21; Pet. App. 95A, 96A, 99A-100A). The lack of a proposal that could be the subject of environmental study would complicate and extend the task of preparing the impact statement respondents seek.

Finally, the adequacy of any impact statement finally prepared for the Northern Great Plains could become the subject of a challenge in the courts. The time necessary to adjudicate such a challenge, when added to the approximately three years that the Department of the Interior estimates would be consumed by preparation of the statement itself, would create a period of delay well in excess of the time required for this Court to pass upon the issues we have presented.

3. Respondents assert (Br. in Opp. 17) that "there have been at least 29 federal coal leases issued in the [Northern Great Plains] since January 1, 1970, and not a single environmental statement has been prepared." In our view, this is irrelevant to the question presented by this case. It is, in any event, inaccurate. The Department of the In-

terior has informed us that the government has issued 14 new coal leases on public lands and 10 new coal leases on Indian lands within the Northern Great Plains since January 1, 1970. An environmental assessment (although not necessarily an impact statement) was prepared for all of these leases. The Department has previously taken the position that a full impact statement need not be prepared for a lease if one was prepared for any mining plan; no coal mining can occur under federal leases in the absence of an approved mining plan. Impact statements have been prepared prior to the approval of any mining plan. As we stated in the petition, however, it is now the policy of the government to prepare an impact statement before approving any coal lease that would have major effects upon the quality of the human environment.

In *Cady v. Morton*, C.A. 9, No. 74-1984, decided June 19, 1975, to which respondents refer, the government had issued a lease and approved a mining plan permitting mining on a portion of the leased lands. An impact statement had been prepared for the mining plan but not for the lease. The court of appeals directed the government to prepare an impact statement for the lease as well, but it allowed mining to continue under the approved mining plan. We believe that the court of appeals should have followed the same course here. If, contrary to our arguments, an impact statement must be prepared for the Northern Great Plains as a region, the government still should be free to proceed with respect to individual projects that have been fully analyzed in unchallenged impact statements. *Cady* indicates that the court of appeals here should have refrained from enjoining fully-analyzed federal actions.

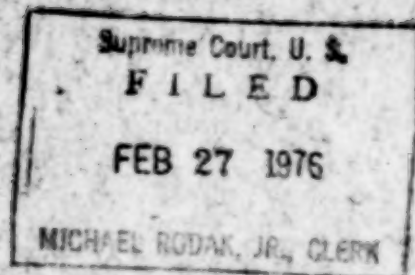
4. As we explained in our petition and in our application for a stay, this case is of great importance to the Nation's energy needs and to the interpretation of NEPA.

Further delay in the disposition of this case, and further continuation of the court of appeals' injunction, are not warranted. The petition for a writ of certiorari should be granted and the court of appeals' injunction should be stayed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.



No. 75-552

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

SIERRA CLUB, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 514 F. 2d 856. The order of the court of appeals granting an injunction pending appeal (Pet. App. B) is reported at 509 F. 2d 533. The order of the court of appeals remanding the case to the district court for supplemental findings (Pet. App. C) is not reported. The opinion of the district court (Pet. App. D) and its supplemental findings of fact (Pet. App. E) are not reported.

(1)

JURISDICTION

The judgment of the court of appeals (Pet. App. F) was entered on June 16, 1975. By order of September 3, 1975, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 10, 1975. The petition was filed on October 9, 1975, and was granted on January 12, 1976. (On the same day, the Court granted the petition for a writ of certiorari in *American Electric Power System v. Sierra Club*, No. 75-561, filed by the intervenor-defendants in this case.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Federal law authorizes the Department of the Interior to permit coal mining on federal lands by private parties under approved mining plans. In order to evaluate the environmental effects of its leasing program and decide upon future actions, the Department prepared a nationwide, programmatic environmental impact statement. Before issuing individual leases or approving mining plans having a significant effect upon the environment, the Department prepares an environmental impact statement considering the effects of that lease or mining plan, both individually and in combination with other leases. When necessary or appropriate, the Department also prepares impact statements for areas embracing several leases and plans, such as the 7,800 square mile "Eastern Powder River Basin" within Wyoming.

The question presented is whether, under the National Environmental Policy Act, a court may inter-

vene in this decision-making process to require federal agencies to engage, in addition, in "regional" planning and to issue an additional impact statement for a four-state area so long as they continue "contemplating" private applications, even though there neither is nor will be a recommendation or report on a proposal for major federal action with respect to that four-state area.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

(2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

STATEMENT

A. FEDERAL PROGRAMS FOR COAL DEVELOPMENT

Coal represents about 94 percent of our Nation's identified primary energy reserves (App. 188). As much as 80 percent of the Nation's coal is under land owned by the federal government, or under land that can be mined effectively only after obtaining rights of way across federal land.¹

The coal deposits in the West have assumed greater significance as sources of energy not only because of their abundance² but also because of their low sulfur content (which makes them environmentally desirable) and their relatively easy recovery by surface mining methods.

Congress has recognized the importance of coal in America's energy future. The Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 *et seq.*, enacted on December 22, 1975, has as one of its purposes the reduction of "the demand for petroleum products and natural gas through programs designed to pro-

¹ Department of the Interior, *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program 1-7* (1975) (hereafter *National Impact Statement*). A copy of the *National Impact Statement* has been lodged with the Clerk of this Court.

² The Department of the Interior has divided the Nation's coal lands into six "provinces": (1) the Pacific Coast province, including Alaska; (2) the Rocky Mountain province; (3) the Northern Great Plains province (covering the Dakotas, Montana, Wyoming, Idaho, Nebraska, and Colorado); (4) the Interior province; (5) the Gulf province; and (6) the Eastern province. The Northern Great Plains and Rocky Mountain provinces contain about 54 percent of the Nation's identified low-sulfur coal.

vide greater availability and use of this Nation's abundant coal resources * * *" (Pub. L. 94-163, 89 Stat. 874). In order to facilitate the accomplishment of that goal, that Act provides to the Administrator of the Federal Energy Administration the power to compel utilities and certain other petroleum users to convert to coal use.³ See Pub. L. 94-163, Section 101, 89 Stat. 875.

Coal situated under federal lands can be mined only with the permission of the federal government. The Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. (1970 ed. and Supp. IV) 181 *et seq.*, authorizes the Department of the Interior to dispose of certain minerals by leasing to private firms and individuals, for terms of years, the rights to develop and extract coal, oil, and other minerals that lie within the federal domain and Indian lands. As privately owned coal deposits become exhausted or more expensive to mine, and as the Nation's energy needs grow, coal underlying federal lands will become more and more important as a source of energy.⁴

The development of these vast reserves of coal will inevitably affect the quality of the human environment in the vicinity of the mines. The federal government not only has the duty to superintend the development of its mineral resources, but also has the

³ The Administrator had, until June 30, 1975, enjoyed such power under the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246. The Administrator has directed 74 power generation plants to convert to coal. 40 Fed. Reg. 28430.

⁴ See *National Impact Statement, supra*, note 1, at 1-24 to 1-28.

duty, articulated by the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, to probe the environmental consequences of its proposed actions and to develop its resources in a manner that holds to a minimum the disruption of the environment.

In order to fulfill both of these duties, federal agencies, cooperating with each other, with state governments, and with private interests, began to take a careful look at the effects of coal development in the northern Great Plains, where extensive federal coal resources are located. On May 26, 1970, the Department of the Interior initiated the North Central Power Study, which was designed to "investigate the potential for coordinated development of the electric power supply in the north central United States" (Pet. App. 89A). "The responses received did not indicate that a plan for * * * coordinated development could be formulated" (*id.* at 90A), and the Study was terminated in 1972.

The Department of the Interior also began a study of potential water resources in Montana and Wyoming, and the extent to which these resources would be adequate for, and affected by, mining of coal (*ibid.*). This study was suspended on June 30, 1972, when the Department initiated the Northern Great Plains Resources Program, a much more comprehensive investigation of the social, economic and environmental aspects of coal development. That study was designed to provide much-needed information that

could guide the federal government in decision making. "The study is to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A). The final interim report of this Program was issued on August 1, 1975.

In order to avoid making piecemeal decisions while it was gathering environmental information and formulating a national coal leasing program, the Department of the Interior announced on February 17, 1973, that it would issue no more coal prospecting permits and, with a few carefully circumscribed exceptions, that it would issue no more coal leases and approve no more mining plans until it had reevaluated its policies and conducted a full environmental study (*id.* at 90A-92A). The Department simultaneously announced that it would prepare an environmental impact statement assessing the effects of its coal program on a nationwide basis and undertaking to formulate a new program more sensitive to environmental values. A draft of this national "programmative"⁵ impact statement was issued in 1974. It was rewritten in response to comments and reissued in final form on September 19, 1975.⁶ The final impact statement describes "the total proposed Departmental coal leasing program"⁷ and announces the creation of a multistep Energy

⁵ A "programmative" impact statement is a statement that assesses the environmental consequences either of a large number of related federal actions constituting a "program," or of a method of making decisions that will influence a large number of related federal actions.

⁶ *National Impact Statement*, *supra*, note 1.

⁷ *Id.* at 1-3.

Minerals Activity Recommendation System* that takes into account both the Nation's need for coal and the need to preserve the quality of its environment.*

Under the Energy Minerals Activity Recommendation System new coal leases will be made available only when necessary and, even then, "[a]ll coal lease sales would be carefully analyzed to avoid unacceptable environmental impacts or unacceptable impacts on other uses resulting from development of the proposed leases."¹⁰ Whether leasing takes place will depend not only on the need for coal but also on the environmental consequences of mining.¹¹

The national programmatic environmental impact statement has surveyed the general environmental consequences of coal mining. The environmental consequences of each particular mine, however, will have to be understood in order to implement the decision that some deposits of coal will not be leased when the environmental consequences would be too great. Whenever a mining operation would have a significant impact upon the environment, the responsible federal agency will prepare an environmental impact statement. Individual environmental impact statements

* *Id.* at 1-7 to 1-23.

* The Energy Minerals Activity Recommendation System was formally adopted on January 26, 1976, and the moratorium on approvals of coal leases and mining plans was terminated. See the statement of Secretary Kleppe reprinted as an appendix to the brief of petitioners in No. 75-561.

¹⁰ *National Impact Statement*, *supra*, note 1, at 1-5.

¹¹ *Id.* at 1-13.

sometimes will be prepared for particular leases and mining plans,"¹² and the statements for successive leases or mining plans will assess the cumulative effects of all coal mining within the area affected. In many other cases the Department of the Interior will prepare a broader impact statement assessing the effects of coal development in larger parts of the country: "the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors."¹³

Several such impact statements already have been prepared. One of them, issued in final form in 1974 and consisting of 6 volumes and 3075 pages, covers the Eastern Powder River Coal Basin in Wyoming, an area of approximately 7,800 square miles that contains more than one quarter of the Nation's surface coal reserves and three quarters of the coal reserves recoverable by surface or underground mining in the northern Great Plains.¹⁴

¹² ~~A more~~ complete description appears in *id.* at 1-4. See also the affidavit of Secretary Kleppe at App. 189-196.

¹³ *National Impact Statement*, *supra*, note 1, at 1-4.

¹⁴ Department of the Interior, *Final Environmental Impact Statement: Proposed Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming* (1974). See I *id.* at I-21 to I-22 (estimating that the basin contains 12.4 billion tons of economically recoverable coal out of a national total of 45 billion tons of coal economically recoverable by surface mining). A copy of this impact statement has been lodged with the Clerk of this Court.

B. THE COMPLAINT AND THE DISTRICT COURT'S DECISION

Respondents Sierra Club and six other organizations¹⁵ brought suit against various federal agencies¹⁶ on behalf of themselves and their members seeking declaratory and injunctive relief against any approval of leases, rights of way or mining plans in what their complaint called the "Northern Great Plains Region" until the federal government had prepared a comprehensive impact statement with respect to that "Region" (App. 5-26; cf. Pet. App. 85A).¹⁷

Discovery proceeded by interrogatories addressed to the federal defendants. When this had been completed respondents, without filing any affidavits in their own behalf, moved for summary judgment (App. 101-

¹⁵ The National Wildlife Federation; the Northern Plains Resource Council (NPRC); the League of Women Voters of Montana; the Montana Wilderness Association; the Montana League of Conservation Voters; and the League of Women Voters of South Dakota. With the exception of NPRC, neither these organizations nor Sierra Club had established standing to sue. Pet. App. 20A-21 A, n. 20.

¹⁶ The Departments of the Interior, the Army and Agriculture.

¹⁷ The "Northern Great Plains Region" defined by the complaint includes northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota (Pet. App. 88A). This "Region" encompasses some 90,000 square miles (Pet. App. 5A, n. 4). The "Region" is significantly different from the "Northern Great Plains coal province" as defined by the Department of the Interior (see note 2, *supra*).

The district court permitted intervention, as defendants, by the Crow Tribe of Indians, an individual rancher, eight electric public utilities, three natural gas companies, and four mining companies. All intervenors except the Crow Tribe petitioned for certiorari *sub nom. American Electric Power System v Sierra Club*, No. 75-561, granted January 12, 1976.

102). Petitioners filed several affidavits and a cross-motion for summary judgment (App. 116-17) which the district court granted on February 14, 1974 (Pet. App. 85A-101A).

An affidavit filed by Secretary of the Interior Morton stated that there was no federal proposal or program for the control of the development of the Northern Great Plains Region (App. 118-124). Respondents expressly agreed with this statement. Respondents did "not dispute the fact that [petitioners] have no plan concerning coal development in the Northern Great Plains region in the sense of a definite, rational program upon which to base their decisions"; respondents "not only admit[ted] that no plan exists," but also "strongly emphasize[d] this point" because, in their view, it "is the very absence of any such plan which demonstrates so convincingly that NEPA has been violated."¹⁸ In light of this concession and the affidavits of Secretary Morton and other federal parties, the district court found that (Pet. App. 88A):

The "Northern Great Plains region" as described by the [respondents] is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action.

¹⁸ Plaintiff's Reply Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Defendants' Cross Motion for Summary Judgment and to Intervenor-Defendants' Various Motions, p. 13 (filed November 21, 1973).

The court also found that (Pet. App. 88A.; emphasis in original):

There is no existing or proposed Federal regional program, plan, project, or other regional "federal action" *within the meaning of NEPA Section 102(2)* for the development of coal or other resources in the area defined by the [respondents] as the "Northern Great Plains region."

Finally, the court found that (*id.* at 96A):

There is no evidence in the record of this case that individual projects by private industry for the development of coal and other resources in the area defined by the [respondents] as the "Northern Great Plains region" are being planned or constructed as part of any integrated plan or program for any such area, or that any such individual projects are inter-related or integrated with other like projects in such area.

Instead of engaging in regional planning, the district court found, the federal government had been planning on a national scale. It concluded (Pet. App. 90A) that "[t]he Department of the Interior has taken action to control development of coal on a national basis, including the Northern Great Plains." The district court discussed the several studies of the effects of this national policy upon the Northern Great Plains, including the Northern Great Plains Resources Program. It concluded that these studies were not attempts to formulate a plan, program or proposal for the development of any particular "region," but instead were designed to enable the government to un-

derstand the local effects of its national policies and to plan more effectively with respect to its decisions concerning individual mines. The court found that the purpose of Northern Great Plains Resources Program "is to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A), and that all of the studies collectively "are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures" of NEPA (*id.* at 90A).

On the basis of these and other findings of fact the district court concluded that the Northern Great Plains Resources Program "is a study project and not a program for development" (Pet. App. 100A); that "[m]ultiple applications for Federal action in connection with individual private projects which are unrelated to each other, except that they involve resource development at some point within a multistate area, do not constitute a private or Federal regional plan or program for development, nor do they require the Federal Government to develop a regional plan or program for development with respect to such multiple applications" (*id.* at 98A); and that since "there is no existing or proposed regional program or project or other regional 'federal action' within the meaning of NEPA Section 102(2) for the development of coal or other resources in the 'Northern Great Plains region', the complaint does not set forth a claim upon which relief can be granted" (*id.* at 99A). Therefore,

the court held no impact statement for the "Region" need be prepared."

Respondents sought an injunction pending appeal, which was denied by the motions panel of the court of appeals on June 17, 1974 (Br. in Opp. App. 1a-3a). The district court later entered supplemental findings in response to a remand by another panel of the court of appeals (Pet. App. 81A-83A). These findings (Pet. App. 103A-116A) brought the record up to date as of November 25, 1974.

C. THE COURT OF APPEALS' DECISION

Shortly after the district court entered its supplemental findings, the court of appeals issued an injunction pending appeal (Pet. App. 75A-76A). This injunction prohibited the Secretary of the Interior from taking any action "concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement" (*id.* at 76A). The court of appeals did not conclude that the Eastern Power River Basin impact statement is inadequate; indeed, its adequacy has not been challenged. It recited only that "such an injunc-

¹⁹ The district court also concluded that granting an injunction "would cause irreparable injury * * * to the public at large" (Pet. App. 101A; cf. *id.* at 96A) and that "[e]ven if there were some regional Federal program for the development of coal and other resources in the 'Northern Great Plains region', NEPA would not prohibit Federal action upon an individual project within the 'region' on the basis of an environmental impact statement prepared for that project prior to completion of the regional program" (*id.* at 100A).

tion is required to maintain the status quo pending disposition of this appeal" (Pet. App. 75A). Judge MacKinnon dissented (*id.* at 76A-80A).

Five months later a divided panel of the court of appeals reversed the district court (Pet. App. 1A-73A). The court held that although petitioners have not yet violated NEPA, they will do so if they continue "contemplating" federal action in the "Northern Great Plains Region" without preparing an environmental impact statement with respect to that part of the country. See Pet. App. 2A, 33A, 42A, 47A-48A.

The court of appeals expressly accepted "the facts as found by the District Court" (Pet. App. 39A), thereby agreeing with the district court's finding that there is no federal program or proposal calling for regional development. Indeed, the court could not have done otherwise, for there is no contrary evidence and respondents once more "agreed that the federal government has no regional plan," arguing that "the very absence of any such planning demonstrates" that NEPA "has been violated."²⁰

The court of appeals addressed two questions (Pet. App. 2A): "whether [petitioners'] attempts to control development of coal resources in four western states constitute a major federal action * * * and, if so, whether those attempts are sufficiently developed to require the filing of a comprehensive regional impact statement." Although the district court's factual

²⁰ Brief of Appellants, p. 47.

findings would appear to require a negative answer to both questions, the court of appeals answered the first question in the affirmative and remanded the case to the district court to determine whether the time was "ripe" for an affirmative answer to the second.

The court of appeals began its legal discussion by considering respondents' argument that the various private requests for leases and rights of way were so related that the government should be required to develop a regional plan accompanied by a comprehensive impact statement (Pet. App. 28A-32A). The court of appeals stated that although it did "approve, in theory" the legal basis of respondents' argument (*id.* at 31A-32A), it was unnecessary to consider the point further. It decided instead that, by engaging in regional studies and analyses such as the Northern Great Plains Resources Program, and by receiving (albeit not granting) applications for leases, the government had demonstrated "attempts" (*id.* at 2A, 34A, 36A, 39A) "to control development" of coal resources in the area, which establish that a "regional program" "is contemplated" by the government (*id.* at 33A, 39A, 42A; emphasis added). These "attempts" and "contemplation" in turn trigger the impact statement requirement of NEPA, the court held, and a "regional" impact statement must be prepared at the appropriate time (*id.* at 33A-34A, 39A). The court concluded (*id.* at 33A-34A; emphasis added) that "the relevant question is not whether major federal actions are *being* taken in the Northern Great Plains, nor is it whether impact statements are necessary for those actions. The

question is whether [petitioners] have treated those actions regionally in such a way that they comprise, cumulatively, a major federal action. We believe the evidence mandates an affirmative answer."

The court's emphasis upon "attempts" and "action" in some passages of the opinion is not fully consistent with its emphasis upon "contemplation" in other passages. For example, in the beginning of the opinion the court held that the government has engaged in "major federal action" (Pet. App. 2A); near the end of the opinion the court stated only that major federal action is "contemplated" (*id.* at 42A). Despite this latter conclusion—that the government is "contemplating" regional development—the court stated that the "Government has not yet finally settled on its role" (Pet. App. 45A). The court remanded the case to the district court and directed the federal agencies to determine whether they would prepare an impact statement or whether "contrary to expectations" they would cease following the course the court thought they had been following (*id.* at 47A-50A). If the government decided not to prepare an impact statement for the region described by respondents, the court stated, respondents may "present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement" (*id.* at 50A). Since the court already has indicated (*id.* at 29A-32A) that the "legal basis" of respondents' contention is correct, it follows that the district court would be empowered to direct the government to

prepare an impact statement if it declines the court of appeals' invitation to do so voluntarily.

The court's discussion contains numerous descriptions of the appropriate time for release of the final impact statement. The court variously states that "an impact statement [must] accompany all proposals" (Pet. App. 3A); that "[a] statement must precede the recommendation" (*id.* at 42A); that "a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action" (*ibid.*); that "[t]he impact statement is intended to aid agency planning and decision-making *before* the final recommended proposal for action is made" (*id.* at 47, n. 35; emphasis in original); and that "a comprehensive [impact statement] should accompany the proposal for action" (*id.* at 48A). Although these statements are not entirely consistent, their thrust appears to be that the final impact statement must be issued well in advance of any recommendation or report on a proposal for major federal action.²¹

²¹ The court of appeals discussed four "ripeness factors" that, it thought, controlled the proper timing of the regional impact statement that would be required unless, "contrary to expectations," the government abandons the course the court thought it had been following. Two of these indicated to the court of appeals (Pet. App. 44A) that "the time for a statement is indeed ripe." The district court apparently would be free to consider only the other two. The first of those two is "the relevant geographic area for development" (*id.* at 45A), a question that seems to bear neither

The court of appeals continued in effect its temporary injunction pending appeal, even though it conceded that the "Secretary of the Interior has shown concern over developing the coal reserves of the Province in a responsible manner consistent with NEPA" (Pet. App. 4A-5A).

Judge MacKinnon dissented, observing that the "record * * * does not establish the existence of any comprehensive *regional* program of the type * * * which could justify requiring the preparation of a regional environmental impact statement at this time" (*id.* at 54A). Because there was neither federal action with respect to the region, nor a proposal for such action, Judge MacKinnon "conclude[d] that a regional environmental impact statement * * * is not presently required * * * [and found] no need to remand the case for further proceedings" (*id.* at 52A-53A).

D. SUBSEQUENT PROCEEDINGS

Petitioners requested the court of appeals to dissolve its injunction relating to the four pending proposals in the Eastern Powder River Basin. In support

on timing nor on the need for a regional impact statement, but on the scope of the statement that must be prepared. The second is whether the moratorium on the approval of further leases or mining plans remains in effect (Pet. App. 46A). Since the moratorium now has been lifted, the district court apparently would be compelled to resolve this factor in favor of ripeness. The upshot of all of this is that an impact statement must be prepared unless the federal government decides not to approve any mining of coal. Even then, the court of appeals indicated, an impact statement might be required (*id.* at 48A and n. 37).

of this application we submitted an affidavit by Frank G. Zarb, Administrator of the Federal Energy Administration (App. 205-208) and an affidavit by Thomas S. Kleppe, Secretary of the Interior (App. 187-204). Mr. Zarb's affidavit stated that orderly development of this Nation's coal resources is crucial to the attainment of the national goals embodied in *Project Independence Blueprint*. Secretary Kleppe stated once more that the final interim report of the Northern Great Plains Resources Project neither constitutes a "proposal for federal action nor does it recommend or propose a development plan for the area" (App. 191), and he made it clear that the Department "does not have a plan or program to develop or contribute to the development or to control the development of coal resources in the Northern Great Plains, the Rocky Mountain area, Appalachia, or any other 'region' or 'province', as such, in the country" (App. 195-196). Both Secretary Kleppe and Administrator Zarb demonstrated in detail the reasons why further delay in governmental approval of leases and mining plans pending the preparation of a regional impact statement would seriously undermine the government's ability to deal with the need for energy.

On October 9, 1975, respondents requested the court of appeals to enlarge its injunction so as to encompass yet another mining operation in the Northern Great Plains, the Belle Ayr South mine of the Amax Coal Company. Amax was not a party to the suit. It had been mining coal for about three years and sought

the Department's approval of a mining plan covering proposed mining of 126 acres per year. Amax intervened and, opposing respondents' motion, explained that without federal approval of its plans it would have to discontinue operations within a few months. We joined Amax in opposing this motion.

On November 7, 1975, the court of appeals denied the federal petitioners' motion to dissolve the injunction and remanded respondents' motion to the district court (Br. in Opp. App. 4a-5a). On November 14, 1975, after holding a hearing, the district court issued an order denying respondents' motion absolutely to enjoin approval of the Amax mining plan, but it enjoined Amax' operations after two years at the rate of mining of 126 acres per year, pending a final disposition of this case (*id.* at 6a-7a).

On November 14, 1975, we requested this Court to stay the court of appeals' injunction pending its resolution of this case. The Court issued the stay on January 12, 1976. On February 13, 1976, Secretary Kleppe approved the four mining plans that had been analyzed by the Eastern Powder River Basin impact statement.

On January 26, 1976, the Department announced that the moratorium against approval of leases and mining plans would be lifted and that the Energy Minerals Activity Recommendation System described in the national programmatic impact statement would be put into effect. See the appendix to petitioners' brief in No. 75-561.

SUMMARY OF ARGUMENT

A. "In order to decide what kind of an environmental impact statement need be prepared"—or, indeed, whether one need be prepared at all—"it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 322 (*SCRAP II*). In *SCRAP II* the private railroads proposed an increase in freight rates; here private firms seek permission to mine coal. The federal action is, in either case, the grant of permission to do so. The Mineral Leasing Act of 1920, 30 U.S.C. 201(a), governs the authority of the Department of the Interior to issue coal leases and to approve mining plans. That Act creates authority to proceed tract-by-tract, application-by-application. The Department of the Interior has proceeded in the authorized manner; it has never proposed a separate "regional" plan for coal development.

The Interior Department has, however, formulated a national coal development policy and has evaluated the effects of its coal program in a national coal programmatic impact statement. This effort represents the federal government's attempt to understand the effects of its policies, and to coordinate its decisions, with respect to coal development.

Coal development creates "regional development" only because federal lands are scattered throughout the many "regions" of the Nation. That tenuous connection between a "region" and the national coal policy does not establish that the federal policy is one of

"controlling the development" of any region. Nor does the existence of the Northern Great Plains Resources Program establish that the federal government is either "attempting" to engage in "regional development" or "contemplating" doing so. The district court found that the Northern Great Plains Resources Program is designed "to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A). Therefore, because the relevant "federal action" is either national or local in character, no "regional" environmental impact statement is necessary.

B. The court of appeals apparently believed that the effects of even a single mine are so pervasive that a "regional" impact statement must be prepared before any mining can commence. But although NEPA requires that an impact statement analyze the "unavoidable" environmental effects of a particular project, and the resources "irretrievably committed" by the federal action in question, the approval of mining at a particular site does not "irretrievably" or "unavoidably" establish any pattern for the region as a whole. While we agree that the effects, even (within reason) the far-flung effects, of a single mine must be analyzed in the impact statement pertaining to that mine, "development of the region" is not an effect of mining in a single location. Approval of mining in one place does not make approval of mining elsewhere inevitable. Although the amount of coal mined in the Northern Great Plains will no doubt increase over time,

that increase is attributable to the nationwide need for energy, and not to any effects of one lease upon the application for any other.

C. Even if the court of appeals were correct that major federal action is "contemplated" with respect to the Northern Great Plains as a region, it would not follow that an impact statement is required. Section 102(2)(C) of NEPA provides that an agency shall include an impact statement "in every recommendation or report on proposals for * * * major Federal actions" significantly affecting the quality of the human environment. The statutory language states in the clearest terms that the final impact statement must accompany the recommendation or report. Until there has been a "proposal," and until there has been a "recommendation or report" on that proposal, there is no need for such an impact statement. As the Court held in *SCRAP II*, *supra*, 422 U.S. at 320 (emphasis in original), "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." Since it is undisputed that there has been no proposal for a regional plan or program with respect to the Northern Great Plains, and that there has been no recommendation or report on such a proposal, there is no need for a "regional" impact statement.

D. The court of appeals approved in theory respondents' argument that NEPA requires the federal government to engage in "regional planning." In order

to do so, of course, the government would be required to prepare a regional plan—and that, the court wrote, would require a regional impact statement. While the court said it was unnecessary to rest its decision on this ground, we submit that it did so, since it is otherwise impossible to explain why the court thought it inadequate for the government to study the Nation as a whole, each individual mine, and the Eastern Powder River Basin.

The Mineral Leasing Act contains no requirement of regional planning. Its provisions state that leases shall be offered tract-by-tract. Since NEPA does not amend by implication any other statute (*United States v. SCRAP*, 412 U.S. 669, 694, (*SCRAP I*)), the tract-by-tract method established by the Mineral Leasing Act is not altered by NEPA. Moreover, Section 102(2)(C) of NEPA itself plainly contains no requirement of "regional planning;" that Section simply provides that a report or recommendation on a proposed plan must be accompanied by an impact statement. It does not require the creation of any particular plan, nor that any plan have particular substantive content.

Even if comprehensive planning is required by NEPA, there was no principled basis upon which the court of appeals could set aside the responsible federal agencies' decisions to conduct a national programmatic study and to supplement that study with impact statements on local mines and regional groupings of mines. Here, as in *SCRAP II*, the responsible

agencies have considered the broad environmental consequences in a consolidated proceeding; it was not an abuse of discretion for these agencies to proceed in individual impact statements to analyze the marginal environmental effects of particular mines or groups of mines.

E. Whether or not a "regional" impact statement is necessary for the Northern Great Plains as a whole, individual projects, the environmental effects of which have been fully analyzed, should not be delayed. As a general rule, no valid interest could be served by allowing a particular project of independent utility—a project that is desired because of that utility and not because of its relationship to some larger project—to be held hostage by objections to the larger project or action that has yet to be proposed or analyzed.

ARGUMENT

This is the seventh year that NEPA has been in effect. During that entire period the Department of the Interior and other federal agencies have been giving careful scrutiny to the environmental effects of coal mining. Several extensive environmental, economic and social studies have been carried out; a national programmatic impact statement has been prepared; individual, local and regional impact statements have been issued. For almost three years there has been a virtual moratorium on the issuance of prospecting permits and leases and the approval of mining plans. Now that the federal government is preparing to implement the carefully designed Energy

Minerals Activity Recommendation System on a national basis and to lift the moratorium, it has been instructed by the court of appeals to delay its program for several years more while it prepares yet another environmental impact statement covering a "region" of respondents' choosing.

The court of appeals' decision does little to promote constructive environmental planning. Such planning has been taking place for many years on a systematic and comprehensive basis. The responsible federal agencies have attempted to assess the environmental effects of coal mining on national, regional and local levels, and have conducted extensive studies (such as the Northern Great Plains Resources Program) in cooperation with local and state governments, affected industries, and other interested groups and individuals. The environmental analyses and impact statements produced by these processes discuss the effects of coal mining in general, and of most mines, two or three times over; the adequacy of most of these analyses and statements has been accepted without judicial challenge. Respondents have sought, instead, to compel federal officials to generate still another layer of environmental assessment, and to prepare an impact statement addressing an area smaller than the Nation as a whole but larger than the largest "region" the federal government has selected for study. It is hard to see what can be gained by such additional study. Valuable time would be lost while the statement is prepared, however, and valuable resources would be consumed in the process.

The district court found that there is no federal plan or proposal for the development of the "Northern Great Plains Region" as a region (see pages 11-14, *supra*). The court of appeals (Pet. App. 39A) and respondents have accepted that finding. Because no plan has been proposed, it would be practically impossible for the federal government to prepare an impact statement for that "region;" analysis of all possible outcomes and infinite permutations is unavailing. The lack of a proposal that could be the subject of environmental study exposes the futility of providing respondents with the impact statement they seek. Moreover, even if a meaningful impact statement could be prepared, its completion would take several years, creating a period of delay detrimental to the efforts of this Nation to use coal as a replacement for imported oil.²²

What is more, the court of appeals' decision implies that groups other than respondents would be able to compel the federal government to engage in "re-

²² Assuming that such a statement could be prepared, the Department estimates that more than three years would be required to do so. A similar length of time was required for the *National Impact Statement*, which was commenced in June 1972 and completed in September 1975. If the Department were to undertake all of the comprehensive studies respondents have indicated are required (Br. in Opp. 18; App. 18-20) still more time would be consumed. And, of course, the adequacy of any impact statement finally prepared could become the subject of a challenge in the courts, adding still another level of delay of uncertain duration.

gional planning" or to issue "regional" impact statements with respect to regions defined by them, whether or not the government has engaged in activity that has peculiar effects upon that "region." Because there are a large number of potential "regions" available for such study the federal government may eventually be required to engage in multiple studies of different and overlapping combinations of "regions." We do not believe that NEPA requires this unproductive effort. We submit that the program of impact statements for the Nation as a whole, related groups of mines, and individual mines adequately fulfills the commands of Section 102(2)(C).

A. THE NEED FOR AN IMPACT STATEMENT IS DETERMINED BY THE SCOPE OF THE PROPOSED FEDERAL ACTION

Section 102(2)(C) of NEPA provides that federal agencies shall include "in every recommendation or report on proposals for * * * major Federal actions" significantly affecting the quality of the human environment a detailed statement concerning the effects of, and alternatives to, that proposal. "In order to decide what kind of an environmental impact statement need be prepared"—or, indeed, whether one need be prepared at all—"it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 322 (*SCRAP II*).

As was the case in *SCRAP II*, the federal action being taken in this case is the approval of private applications to engage in private action. In *SCRAP II* the private action was the charging of particular rates for the transportation of commodities; here the private action is the mining of coal. In *SCRAP II* "the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads" (422 U.S. at 320). Here the government has made a proposal and a report on it by developing and adopting the Energy Minerals Activity Recommendation System, with respect to which it has prepared a national programmatic impact statement. Any additional proposals are requests by private mining companies that they be allowed to mine coal; no additional federal action takes place until a particular lease, right of way or mining plan is approved.²³

When the government approves mining plans, leases or rights of way that will have significant effects upon the environment, it engages in a "major federal action" for the purposes of Section 102(2)(C) of NEPA. It has prepared and will continue to prepare impact statements accordingly. Moreover, the government also may be engaged in a separate "major federal action" by formulating and implementing the

²³ The authority for the program of mineral leases and mining on federal lands is the Mineral Leasing Act of 1920. This Act vests in the Secretary of the Interior the authority to make mine-by-mine decisions with respect to tracts of 40 acres each; no decision to allow or forbid mining on any particular tract commits the Secretary to allow or forbid mining on any other tract. See 30 U.S.C. 201(a).

national program structuring the discretion conferred by the Mineral Leasing Act and applying that program to particular mines. The government consequently has prepared a programmatic impact statement addressing the entire national coal leasing and mining program. The Department of the Interior, and other federal agencies, are committed to preparing similar programmatic impact statements whenever they propose programs of general applicability significantly affecting the quality of the human environment.²⁴ But none of this is the equivalent of any federal action with respect to any "region" of the country.

The district court found that the federal action pertained only to the nation as a whole and to individual mines. The court of appeals disagreed and concluded that the government is either "contemplating" or "attempting" to "control" the "development of the region" defined by respondents. See Pet. App. 2A, 33A,

²⁴ See generally the Council on Environmental Quality NEPA guidelines, 40 C.F.R. Part 1500. Although these guidelines do not bind agencies of the Executive Branch (see, e.g., *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F. 2d 421, 424 (C.A. 5); *Ely v. Velde*, 451 F. 2d 1130, 1135-1136, n. 14 (C.A. 4); Pet. App. 23A, n. 22), petitioners agree with the Council (see 40 C.F.R. 1500.6 (d)) that when a number of related projects logically form a single plan or proposal they should be evaluated in a single impact statement. But this does not mean, as the court of appeals thought, that all projects "related" in some way necessarily form an integrated plan or proposal. There must be a programmatic relationship in the sense that all of the projects are part of a single plan for action; it is not enough that they simply have some feature in common (here, the only thing the private proposals have in common is that they all have to do with coal mining).

34A, 36A, 39A, 42A, 47A-50A. It is not entirely clear to us what the court of appeals means by its conclusion that the government's "role is one of controlling development of the region" (Pet. App. 47A-48A). That statement, of course, begs the question of what region is being "controlled." But what is more, it necessarily involves the untenable assumption that the coal mining program is "regional" in character, and that the only tasks for the court are to isolate the appropriate regions and to direct the government to prepare the appropriate regional impact statements.

The court of appeals neglected the district court's finding of fact that the federal coal program is national rather than regional in character (see pages 11-14, *supra*). The government simply is not attempting to control the development of particular regions; it is attempting to control the development of coal on federal lands, which are themselves scattered throughout the country. It applies the same decision making policy to private applications from any part of the country. Coal development creates "regional development" only because some federal land holdings are close to other holdings, and the effects of mining coal on some of these tracts may be felt on neighboring tracts and in non-federal areas nearby. That degree of interdependence, however, does not indicate that the federal policy is one of "controlling the development" of any "region."

The court of appeals disagreed with this analysis for two reasons: it thought that federal "attempts" and "contemplation" of "regional development" were

inescapably established because (1) the Northern Great Plains Resources Program "is the Government's attempt to formulate a regional program that will enable it to control development of the Northern Great Plains" (Pet. App. 36A); and (2) the government is accepting applications for leases, rights of way, and water option contracts in the Northern Great Plains, and is exercising its power to approve those applications (*id.* at 39A).

The first of these reasons overlooks the finding of the district court that the Northern Great Plains Resources Program is designed "to provide a tool for planning at all levels of government rather than to develop an actual plan" (Pet. App. 93A). As the district court collectively described all of the federal studies of the Northern Great Plains (*id.* at 90A): "Those [studies] * * * are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures of the National Environmental Policy Act of 1969." In short, the existence of the Northern Great Plains Resources Program simply demonstrates that the federal government is deeply interested in the local effects of its national policies. Such a show of interest, however abiding the interest may be, is not the equivalent of the creation of a plan or the institution of a major federal action. The contrary conclusion of the court of appeals lacks any support in the record of this case and seems to contradict not only the findings of district court but also the con-

cessions of respondents, who have repeatedly (see pages 11, 15, *supra*) urged that there is no federal plan or proposal with respect to the Northern Great Plains region defined by them.²⁵

The second reason advanced by the court is no more persuasive. Private requests for federal approval, no matter how numerous, are not federal action. See *SCRAP II*, *supra*, 422 U.S. at 320-321. Here, of course, some of the requests have been granted, and to that extent federal action has occurred with respect to each grant. This does not become "regional" action, however, simply because some of the coal mines are geographically located within a single "region." It is meaningless to say that all coal mines located inside any arbitrary boundary are within that "region." Such a boundary can be drawn around any mine or number of mines; the larger the territory enclosed by the boundary, the more mines or tracts of federal land will be inside. But the fact that a plaintiff can draw such a boundary to enclose numerous federal actions does not indicate that those actions are being taken on a "regional" basis or are being guided by a "regional" plan. The only foundation for the court of appeals' conclusion that the boundary drawn by

²⁵ We submit that the major effect of the reasoning of the court of appeals in this regard would be to discourage federal agencies from engaging in sophisticated studies like the Northern Great Plains Resources Program, lest a court seize upon the study as support for a conclusion that the agency is "contemplating" or "attempting" major federal action with respect to the region studied. If that is the effect of the decision of the court of appeals, then environmental planning has suffered a setback in this case.

respondents enclosed an appropriate "region" was the existence of the Northern Great Plains Resources Program²⁶ and, as we have demonstrated, inferring a regional plan or proposal from the existence of that study is unwarranted.

B. FEDERAL APPROVAL OF PARTICULAR LEASES AND MINING PLANS DOES NOT SO "IRRETRIEVABLY COMMIT" REGIONAL RESOURCES THAT A REGIONAL IMPACT STATEMENT IS NECESSARY

As the district court found, the only pertinent federal actions are the creation of the national coal program and the approval of particular leases, mining plans, rights of way and water rights. It should follow directly from this fact and from our analysis to this point that a regional impact statement is unnecessary. The court of appeals apparently concluded (see Pet. App. 37A-41A and nn. 28, 29), however, that the approval of *any* mining within the "region" defined by respondents so involves the federal government in the "development" of that "region" that a "regional" impact statement must be prepared.²⁷ Put in this

²⁶ Even if the court of appeals were correct in drawing such an inference, it would not support a finding that the "Northern Great Plains region" defined by respondents is a relevant region for environmental study. The Northern Great Plains Resources Program considered the Northern Great Plains Coal Province, a region larger than respondents' proposed region. Compare Pet. App. 2A with *id.* at 88A.

²⁷ The court of appeals relied upon *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F. 2d 1079 (C.A.D.C.) (*SIPI*). Although we do not contest the result

form, the conclusion of the court of appeals has been rejected by at least four other courts of appeals, which have held that it is permissible to subject to environmental scrutiny less than all of some larger and "related" whole, so long as the impact statement for the project under scrutiny fully analyzes all of the environmental effects of that project.²⁸

Section 102(2)(C) of NEPA provides that an impact statement must thoroughly assess, among other things, "any adverse environmental effects which cannot be avoided should the proposal be implemented" and "any irreversible and irretrievable commitments

of *SIP* on its own facts, it does not support the decision of the court of appeals in this case. As Judge MacKinnon pointed out (Pet. App. 61A): "The crucial consideration which justified the requirement of a statement covering more than an individual project in * * * *SIP* * * * was the presence of irretrievable commitments of resources beyond what was actually expended in an individual project. In *SIP* each development in the Liquid Metal Fast Breeder Reactor Program made it more unlikely that the agency could in the future abandon its investment in favor of some alternative energy source * * *." In this case, however, approval of mining at one location does not commit the government to approve mining elsewhere, or even make such approval more likely. Although mining is bound to increase, the cause of that increase is the nationwide demand for coal, not the actions of the government in granting the initial leases. See also pages 38-39, *infra*.

²⁸ See *Sierra Club v. Callaway*, 499 F. 2d 982 (C.A. 5); *Indian Lookout Alliance v. Volpe*, 484 F. 2d 11 (C.A. 8); *Friends of the Earth v. Coleman*, 513 F. 2d 295 (C.A. 9); *Trout Unlimited v. Morton*, 509 F. 2d 1276 (C.A. 9); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F. 2d 1275 (C.A. 9); *Sierra Club v. Stamm*, 507 F. 2d 788 (C.A. 10). See also *Cady v. Morton*, C.A. 9, No. 74-1984, decided June 19, 1975, which holds that the appropriate unit for environmental study is a single mining lease.

of resources which would be involved in the proposed action should it be implemented." The court of appeals wrote that approval of a single mining plan requires preparation of a "regional" impact statement because (Pet. App. 38A, n. 28) "development of one mine is considerably more than an irretrievable commitment to that mine." The court went on to suggest two ways in which that is so: development of one mine requires water that consequently cannot be used to bring an alternative mine to production, and development of any mine "creates pressure for a population influx" (*ibid*). Even if one assumes *arguendo* that both of these factual assertions are correct,²⁹ they do not establish the sort of "regional" effects that would require a "regional" impact statement.

We submit that the court of appeals has confused two lines of inquiry. We do not question the requirement that all of the environmental effects of each mine must be analyzed. Some of those effects will reach well beyond the confines of the tract upon which the mine is operated. The full effects of diversion of water, the influx of people to the tract, and so on, must be assessed. But the effects, even (within reason) the far-flung effects, of a single mine or group of mines³⁰ are one thing; the effects of "developing the region" by

²⁹ Neither assertion has any support in the record of this case.

³⁰ The complex task of making such an assessment often makes it advantageous to evaluate the effects of a number of mines in a single statement, as was done in the Eastern Powder River Basin environmental impact statement, which covers an area containing more than one third of the coal economically recoverable by surface mining in the Northern Great Plains.

allowing more extensive mining are something else entirely. Only the former are "irretrievable commitments" of resources, or effects that "cannot be avoided" in the coal production of a single mine. Accordingly, only the former need be discussed in the impact statement for a particular mine.

We therefore believe that Judge MacKinnon correctly answered the majority's argument by observing that "[t]his record is devoid of the type of commitment of 'regional' resources" that would justify a "regional" impact statement (Pet. App. 63A). Judge MacKinnon went on (*id.* at 63A-64A; footnote omitted):

For example, the decision to permit mining of sub-bituminous coal in Wyoming to which the Federal government has the mineral rights, in no way commits Interior to approving proposals for mining lignite, similarly owned by the United States, in North Dakota. Even within each of the Basins which comprise the Region, development of some portion of the coal reserves does not irretrievably commit the federal agencies to permit development of the entire reserve. * * * It may indeed be the case that widespread development of this area will eventually occur, but the impetus for that development will come from the nation's need for coal and not from the fact that partial development of the region has been allowed.

The court of appeals relied heavily upon *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F. 2d 927 (C.A. 2), in support of its holding that an impact statement for even a

"local" project must assess the effects of "regional" development (see Pet. App. 26A, 28A-29A, 38A, n. 28, 46A-47A, n. 34). *Conservation Society* had held that an impact statement discussing the effects of building 280 miles of four-lane highway must be prepared before construction could commence on 20 miles of two-lane highway, even though no plan existed for constructing the entire 280 miles of superhighway. On our petition for certiorari, this Court vacated and remanded *Conservation Society* (No. 74-1413, decided October 6, 1975), and on remand the Second Circuit now has reversed its initial decision. The new opinion recognizes that the "federal action" related only to the 20 miles of highway that had been proposed for construction. Accordingly, the court wrote, the federal action did not irreversibly or irretrievably commit federal funds or resources to the construction of a highway for the entire corridor, and there was no need to prepare an environmental impact statement for the entire corridor. The disposition on remand in *Conservation Society* strongly supports the position we have taken here.²¹

C. A REGIONAL IMPACT STATEMENT IS NOT REQUIRED IN THE ABSENCE OF A REPORT OR RECOMMENDATION ON A PROPOSAL FOR REGIONAL FEDERAL ACTION

Even if the court of appeals were correct in concluding that major federal action is "contemplated"

²¹ For the convenience of the Court we have reproduced the opinion on remand in *Conservation Society* as an appendix to this brief.

with respect to the Northern Great Plains as a "region,"³² it would not follow that an impact statement is required either now or at such time as the court's four "ripeness" factors would indicate.

The court of appeals described in several ways the time at which an impact statement would be required. It asserted that the impact statement must accompany the proposal for federal action (Pet. App. 3A, 48A) and that an impact statement must precede any recommendation or report on a proposal for federal action (*id.* at 42A, 47A, n. 35). Although its statements concerning the appropriate time are not entirely consistent, their tenor is that an impact statement must be produced as early as possible during an agency's consideration of possible action, before the agency commits itself, "even tentatively, to action" (*id.* at 42A). The four "ripeness" factors enumerated (Pet. App. 43A) and "balanced" (*id.* at 44A-50A) by the court are evidently designed to enforce the court's timing preferences.

³² Although the conclusion of the court of appeals (Pet. App. 34A) that "the federal [petitioners] have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains" is unsupported by the record, it would be accurate to conclude that petitioners "contemplate" regional planning (although not necessarily for the region defined by respondents) because, as the district court found (Pet. App. 94A), and as the *National Impact Statement* confirms, "[i]t is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available [to petitioners] may indicate that statements on smaller sub-regions, geologic structures, basin, or selected individual actions" will be preferable.

But NEPA itself does not contain similar ambiguity about timing, and it does not establish a "balancing" of factors indicating "ripeness" against those of contrary purport. Section 102(2)(C) provides that the agency shall include a final impact statement "in every recommendation or report on proposals for * * * major Federal actions" significantly affecting the quality of the human environment. The statutory language states in the clearest terms that the final statement must accompany the recommendation or report.³³ Until there has been a "proposal," and until there has been a "recommendation or report" on that proposal, there is no need for an impact statement. As the Court held in *SCRAP II*, *supra*, 422 U.S. at 320 (emphasis in original), the quoted sentence of NEPA means that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action."³⁴ It is undisputed that there has been no proposal for a regional plan, program or project with respect to the Northern Great Plains (see pages 11-15, *supra*). Nor has there been a rec-

³³ The point in the decision making process at which the agency makes the recommendation or report will, of course, be determined by the agency.

³⁴ The rather meagre legislative history of NEPA confirms that the statutory language was intended to have its ordinary meaning. The bill passed by the House did not contain an impact statement requirement. See H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969). The impact statement provision in the Senate bill was described (S. Rep. No. 91-296, 91st Cong., 1st Sess. 20-21 (1969)) as requiring any agency "which proposes any major actions" to determine "whether the proposal would have a significant effect upon

ommendation or report by petitioners on such a proposal for federal action. The time for a regional impact statement consequently has not arrived—and it may never arrive.

the quality of the human environment"; and, if "the proposal is considered to have such an effect, then the recommendation or report supporting the proposal" must include findings that, among other things, "the environmental impact of the proposed action has been studied," adverse environmental effects "cannot be avoided by following reasonable alternatives which will achieve the intended purposes of the proposal," and whenever "proposals involve significant commitments of resources" that are "irreversible and irretrievable," such "commitments are warranted." The committee emphasized the need for a "proposal" even more emphatically than does the text of the statute.

The conference report (H.R. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969)) is to a similar effect. The managers on the part of the House observed that Section 102 generally is "based on * * * the Senate bill" because there "was no comparable provision in the House amendment," and stated that subsection (2)(C) requires every agency to "include in every recommendation or report on proposals for legislation or other major Federal actions a detailed statement * * * on the environmental impact of the proposed action, any adverse environmental effects which can not be avoided should the proposal be adopted, [and] alternatives to the proposed action * * *."

No contrary understanding of NEPA is reflected in the floor debates upon the bills: the court of appeals and respondents have cited none. The bill initially passed the Senate without debate, 115 Cong. Rec. 19008-19013 (1969). Before sending the bill to conference, however, the Senate made certain amendments. During the course of the debate on these amendments several Senators demonstrated an understanding that impact statements were to be prepared for inclusion in reports or recommendations and were to discuss the environmental effects of the proposals thus reported upon. *Id.* at 29052-29053, 29055, 29058. The House bill, which was received in the Senate during these debates, precipitated similar references. *Id.* at 29068, 29085. The House agreed to the conference report without recorded objection (*id.* at 40923-40928).

D. NEPA DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO ENGAGE IN "REGIONAL PLANNING"

Quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F. 2d 827, 836 (C.A.D.C.), the court of appeals thought the language used in that opinion, "[v]iewed broadly," imposes a requirement under NEPA that the government engage in "comprehensive planning" (Pet. App. 30A-31A). The court continued (*id.* at 31A):

Agency violation of this substantive duty by a failure to improve its plans or coordinate its actions might justify a judicial directive to coordinate various major federal actions into one comprehensive major federal action, followed by a directive ordering issuance of a comprehensive impact statement for that newly-comprised action.

While the court therefore approved "in theory" (*id.* at 31A-32A) respondents' argument that NEPA requires the federal government to engage in "regional planning," the court stated that it was not deciding the case on that ground because here the federal government is contemplating regional development (*id.* at 32A-33A).

It is difficult to credit the court's disclaimer of the foregoing reasoning as a basis for its decision. Even if an impact statement sometimes must be issued when federal agencies are "contemplating" action, and even if such a statement must assess the environmental impacts of all "related" activities throughout the rele-

vant "region," the choice of the relevant region is, in the first instance, for federal officials, to be upset only if their choice is arbitrary, capricious, or an abuse of discretion. If the court agreed with these principles, as it stated that it did (Pet. App. 31A, n. 26; 32A; 45A-46A, n. 33; 48A, n. 36), how then could the court conclude that it was an abuse of discretion to select for scrutiny the Eastern Powder River Basin, an area containing more than a third of the coal reserves economically recoverable by surface mining in the northern Great Plains? The court of appeals did not explain why it was an abuse to select for "regional" study an area other than the "Northern Great Plains Region" defined by respondents. We do not think this omission can be explained unless the court was, in fact, compelling the government to engage in "regional" planning more broadly defined, the very course it purported to eschew (*id.* at 30A-32A).

If an agency is required to engage in such planning, it would be required to prepare an impact statement whenever any agency made a report of recommendation on the proposed regional plan. Thus, under the analysis of the court of appeals, a regional impact statement would be required. We submit, however, that this bootstrap argument finds no support in NEPA.

Section 102(2)(C) itself plainly contains no requirement of regional planning. It simply provides that, when a report or recommendation is made on a proposed plan, the report or recommendation must be

accompanied by an impact statement. It does not require the creation of any plan, let alone a "regional" plan. The Mineral Leasing Act, under which federal agencies grant coal leases and approve mining plans, contains no requirement of regional planning; that Act provides for the approval of actions on a tract-by-tract basis. 30 U.S.C. 201(a). NEPA does not amend or repeal by implication any other federal statute (see *United States v. SCRAP*, 412 U.S. 669, 694 (*SCRAP I*)) and it does not do so with respect to the national program created by the Mineral Leasing Act.

NEPA does contain several provisions that might be thought to require comprehensive or systematic environmental consideration. Section 101(b) declares that it is federal policy to "improve and coordinate Federal plans" in order better to consider environmental consequences. Section 102(2)(A) requires federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences"; Section 102(2)(B) requires federal agencies to "identify and develop methods and procedures * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration"; Section 102(2)(E)³⁵ requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action * * *." Although the language of Section 101 appears to be precatory,

³⁵ 42 U.S.C. (1970 ed.) 4332(2)(D) (Section 102(2)(D)) was renumbered as Section 102(2)(E) by Pub. L. 94-83, 89 Stat. 424.

the requirements of Section 102 apply independently of the impact statement requirement of Section 102(2)(C). *Trinity Episcopal School Corp. v. Romney*, 523 F. 2d 88, 93 (C.A. 2).

The district court held (Pet. App. 98A-100A) that petitioners have complied with these requirements, and the court of appeals did not disturb those findings. But even if these sections create a requirement of comprehensive "planning,"³⁶ they manifestly do not require that this planning be carried out on a "regional" basis, or that the region defined by respondents be forced upon the government as the appropriate region for such comprehensive study.³⁷

³⁶ The court of appeals did not justify its apparent leap from the NEPA requirement of comprehensive study and analysis to a requirement of "planning." Even Section 101 of NEPA, which declares a policy "to improve and coordinate Federal plans," does not indicate that plans must be created solely in order that they can be "improved" and "coordinated." The leap from "study" to "planning" was necessary to the court's conclusion, however, because in the absence of a recommendation or report on a "plan" or proposal, there is no need for an impact statement.

³⁷ We also believe that a requirement of "regional planning" would be impractical. NEPA contains no guidelines that would help either an agency or a court select an "appropriate" region for planning. Consequently, no matter what region the agency selected, it always would be open for litigants or the courts to second-guess the agency in an essentially standardless fashion. As Judge MacKinnon observed (Pet. App. 71A), such an interpretation of NEPA "could result in the generation of an infinite progression of comprehensive plans which would have to be justified by comprehensive impact statements. It seems obvious that NEPA was enacted as a means of facilitating agency decision making and not as a means of paralyzing the federal government." Even the majority of the court of appeals noted that its interpretation of NEPA would produce what it referred to as "practical difficulties" (*id.* at 31A).

There is no principled ground upon which the court of appeals could decline to accept the judgment of the responsible federal agencies concerning the appropriate way in which comprehensive analysis should be carried out. In this case a national coal program has been formulated and a national programmatic impact statement has been issued. When local groups of mines are intimately related in a region defined by common natural characteristics, federal officials will prepare a "regional" impact statement, as was done for the Eastern Powder River Basin, a formation containing more than one third of the coal economically recoverable by surface mining in the Northern Great Plains Province. The court of appeals, although acknowledging the unanimous holdings of other federal courts that the choice of federal officials in this regard may be disregarded only if it is arbitrary, capricious or an abuse of discretion (see Pet. App. 31A, n. 25; 32A; 45A-46A, n. 33; 48A, n. 36),³⁸ apparently thought it arbitrary and capricious to select the Nation as a whole for "comprehensive" study and the Eastern Powder River Basin for "regional" study. The court of appeals articulated no reason for this holding, and we know of none.

In many ways, if "comprehensive" planning is required by NEPA, this case is controlled by an aspect *SCRAP II*, in addition to the timing requirements we have already discussed. In *SCRAP II* the Inter-

³⁸ Cf. *Pauling v. McNamara*, 331 F. 2d 796 (C.A.D.C.) (Burger, J.), certiorari denied, 377 U.S. 933.

state Commerce Commission, presented by private railroads with a request for an across the board rate increase, had elected to discuss in that proceeding only the marginal environmental effects of the increase, delegating to another proceeding the full environmental analysis of the rate structure. The Court (422 U.S. at 325-326) expressly approved that division of analysis, concluding that NEPA does not empower reviewing courts to substitute their planning judgment for that of the agencies with statutory jurisdiction and relative expertise. In this case the responsible federal agencies have elected to conduct an overall, national analysis of the effects of the coal leasing program; that analysis has been completed. The federal agencies have left the analysis of specific mines or groups of mines to separate statements. Here, as in *SCRAP II*, the overall plan, program or action has been given separate environmental attention, and it is appropriate for the responsible agencies to proceed in individual impact statements to analyze the marginal environmental effects of specific projects or proposals.

E. EVEN IF A "REGIONAL" ENVIRONMENTAL IMPACT STATEMENT MUST BE PREPARED, INDIVIDUAL PROJECTS THAT HAVE RECEIVED FULL ENVIRONMENTAL STUDY CAN PROCEED

Without explaining the basis upon which it did so, the court of appeals enjoined further federal action with respect to the mines discussed in the Eastern Powder River Basin impact statement. The court of

appeals apparently believed that, even though the adequacy of the Eastern Powder River Basin impact statement has never been challenged, the projects discussed in that statement could not go forward until an appropriate "regional" impact statement has been prepared. We have argued above that NEPA does not require an impact statement for the "Northern Great Plains region" defined by respondents. If the Court disagrees with this submission, it will be required to decide whether individual projects within the Northern Great Plains can be undertaken during the time needed to complete the "regional" impact statement. We submit that there is no reason to delay action on projects the environmental effects of which have been fully scrutinized.

The need for a "regional" impact statement and the need for an impact statement on a particular mine or group of mines are logically distinct. A "regional" impact statement would address the long-term, synergistic effects of many mines operating within the region. Allowing mining to go forward at a few particular mines the environmental effects of which have been fully studied will not hinder the ability of the government to conduct a regional study and will not diminish the usefulness of the regional study once completed. The broader study still could furnish information helpful in making future decisions. For these reasons at least two courts of appeals have explicitly allowed particular projects to proceed while more comprehensive impact statements were being pre-

pared. *Cady v. Morton*, C.A. 9, No. 74-1984, decided June 19, 1975 (allowing mining to proceed under a fully-analyzed mining plan pending preparation of an impact statement for a much larger mining lease); *Citizens for Balanced Environment and Transportation, Inc. v. Volpe*, 503 F. 2d 601 (C.A. 2), certiorari denied *sub nom. Citizens for Balanced Environment and Transportation, Inc. v. Coleman*, No. 75-255, October 6, 1975 (allowing construction to proceed on a segment of a highway pending preparation of the impact statement that had been required by another panel of that court in *Conservation Society, supra*).

We submit that, as a general rule, individual federal actions of independent utility should be allowed to proceed once their individual environmental effects have been fully analyzed, even though it might also be necessary to prepare an impact statement concerning a larger "whole" of which the individual action is a part.³⁹ No valid interest is served by allowing

³⁹ With the exception of the opinion below and of the now withdrawn opinion in *Conservation Society, supra*, the courts of appeals have held that a project with independent utility should not be enjoined pending preparation of an impact statement covering a general plan of greater dimensions. See *Sierra Club v. Callaway, supra*, 499 F. 2d at 987, 990; *Indian Lookout Alliance v. Volpe, supra*, 484 F. 2d at 19; *Daly v. Volpe*, 514 F. 2d 1106, 1110 (C.A. 9); *Sierra Club v. Stamm, supra*. Cf. *Nucleus of Chicago Homeowners Association v. Lynn*, 524 F. 2d 225 (C.A. 7), petition for a writ of certiorari pending *sub nom. Nucleus of Chicago Homeowners Association v. Hills*, No. 75-951; *Trinity Episcopal School Corp. v. Romney*, 523 F. 2d 88, 95 (C.A. 2); *Swain v. Brinegar*, 517 F. 2d 766, 766, n. 12 (C.A. 7).

Some of these courts have indicated that, if a project has "independent utility," this fact alone demonstrates that there need

a particular project of independent utility—a project which is desired because of that utility and not because of its relationship to some larger project, and the environmental effects of which are fully understood—to be held hostage by objections to some "regional" plan that has yet to be proposed or analyzed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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PETER R. TAFT,
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FEBRUARY 1976.

not be an impact statement covering the larger plan of which the individual project is a part. We do not necessarily endorse this view; we believe that it is more appropriate to look to the language of NEPA to determine when an impact statement is necessary and what the appropriate scope of that statement should be. The "independent utility" test does indicate, however, that in the view of these courts individual projects should be allowed to go forward, regardless of their relationship to some other plan, when they would be built or adopted whether or not the larger plan reaches fruition and whether or not an impact statement is required with respect to that larger plan.

APPENDIX

United States Court of Appeals for the Second Circuit

Nos. 63, 288—September Term, 1975
(Submitted December 10, 1975—

Decided February 18, 1976.)

Docket Nos. 73-2629, 73-2715

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT,
INC.; BERNARD G. WINSLOW, LEON R. ELDRED,
ANSTISS H. ELDRED and WALLACE E. VAN KEUREN,
individually and as members of THE CONSERVATION
SOCIETY OF SOUTHERN VERMONT; LAWRENCE WASCO
and RUTH WASCO, and THE VERMONT ASSOCIATION
OF RAILWAY PASSENGERS, APPELLEES

v.

SECRETARY OF TRANSPORTATION; H. JAMES WALLACE,
FRANK A. BALCH, HENRY O. ANGELL, ROBERT S.
BIGELO, and H. GORDON SMITH, in their capacities
as members of the VERMONT STATE HIGHWAY
BOARD; JOHN T. GRAY, Commissioner of Highways,
State of Vermont; and DAVID B. KELLEY, Division
Engineer, Federal Highway Administration,
APPELLANTS

Before MOORE, MULLIGAN and ADAMS,* *Circuit
Judges.*

On remand by the Supreme Court of prior opinion
in light a new addition to a federal statute and a re-

*Of the Third Circuit Court of Appeals, sitting by designation.

cent Supreme Court case. Prior opinion and district court opinion both reversed.

HARVEY D. CARTER, JR., Bennington, Vermont (Williams, Witten, Carter & Wickes, Bennington, Vermont), *for Appellees*.

ROBERT C. SCHWARTZ, Asst. Attorney General, Vermont, Montpelier, Vermont: Walter Keichel, [sic] Jr., Acting Asst. Attorney General, Edmund B. Clark, Kathryn A. Oberly, Attorneys, Department of Justice, Washington, D.C., *for Appellants*.

SARAH CHASIS, New York, New York, of Counsel, *for Amici Curiae Natural Resources Defense Council, Inc.*

ARTHUR J. O'DEA, Manchester, Vermont, *for Amicus Curiae, Town of Manchester*.

PER CURIAM:

On December 11, 1974 this court rendered its opinion in *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F. 2d 927, which affirmed a judgment of the District Court of Vermont reported in 362 F. Supp. 627 (1973). The Solicitor General petitioned for and was granted a writ of certiorari. On October 6, 1975, this court's prior judgment was vacated and the case was remanded for further consideration in light of Public Law 94-83 and *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975). 96 S. Ct. 19. The reported opinions fully set forth the facts involved in this litigation and they will not be repeated here except as relevant to the remand.

In *Conservation Society of Southern Vermont v. Secretary of Transportation*, *supra*, this court reaffirmed the rule it announced in *Greene County Planning Board v. FPC*, 455 F. 2d 412, cert. denied, 409 U.S. 849 (1972) which required that an Environmental Impact Statement (EIS) sufficient to comply

with the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA) had to be prepared by the responsible federal agency and not by a state agency. As a result of this decision, the Federal Highway Administration (FHWA) initially ordered an almost total halt to all federally funded highway projects in the three states of this Circuit, and the states themselves have refrained from committing additional funds until the issue was finally decided. In response to our decision in *Conservation Society*, the Congress enacted Public Law No. 94-83 which added a new section 102(2)(D) to NEPA.¹

The legislative history of the enactment makes it clear that the Congress intended to overturn our de-

¹ "Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

"(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

"(ii) the responsible Federal official furnishes guidance and participates in such preparation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

"(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."

cision in *Conservation Society*. 1975 U.S. Code Cong. & Admin. News 1797, quoting from Senate Rep. 94-52 at 2. Indeed in the District Court Judge Oakes had earlier suggested that delegation of authority to prepare the EIS to the responsible state agency as an issue that should be taken to Congress. 362 F. Supp. at 631. Under the law as amended the state agency may prepare the EIS provided the federal agency "furnishes guidance and participates in such preparation" and provided "the responsible Federal official independently evaluates such statement prior to its approval and adoption." Judge Oakes's findings in the District Court establish that the appropriate federal official "maintained frequent contact" with state officials in the preparation of the EIS, and was in verbal communication two or three times weekly with the state official primarily responsible for the preparation of the EIS; the FHWA division engineer undertook a field trip to examine the proposed route, during which environmental considerations were noted and discussed. 362 F. Supp. at 629. Although the state agency prepared the EIS it was in consultation with FHWA; the draft was submitted to FHWA at its offices in both Vermont and New York. *Id.* at 630. It was reviewed by the FHWA regional office, the division office, the federal planning engineer and the federal area engineer; it was circulated by the regional office to an interdisciplinary task force which made three suggestions, all of which were incorporated in the final EIS. The District Court concluded that the EIS was prepared by the local state agency "with communication from and cooperation of the regional FHWA, followed by review by an FHWA 'task force' at the regional level" *Id.* at 630.

These findings have not been appealed and we conclude that there was compliance with the procedural

requirements of Public Law No. 94-83. In our prior opinion we noted that "the district court found that substantively the EIS was adequate. There is no appeal from this aspect of the district court opinion." 508 F. 2d at 929 n.6.²

We also affirmed the holding of the district court that an EIS be prepared for the entire 280-mile length of Route 7 even though no plan then existed for constructing the superhighway through Connecticut, Massachusetts and Vermont. 508 F. 2d at 934-36. The Supreme Court remand here cites *SCRAP*, *supra*, which holds that a federal agency must prepare its EIS at "the time at which it makes a recommendation or report on a *proposal* for federal action." 422 U.S. at 320 (emphasis in original). Here the findings of the district court were that, although federal officials had knowledge of the overall planning process of state officials, there was "no overall federal plan" for improving the corridor into a superhighway. 362 F. Supp. at 636. The federal action being taken here relates only to the twenty-mile stretch between Bennington and Manchester in Vermont. The stretch is "admittedly a project with local utility," 508 F. 2d at 935. Hence we see no irreversible or irretrievable commitment of federal funds for the entire corridor and under *SCRAP* no obligation for a corridor EIS. See *Friends of the Earth v. Coleman*, 513 F. 2d 295, 299-

² We point this out since appellees argue that FHWA evaluation was pro forma because the EIS was substantively deficient. They also mention that despite the findings of the district court which we have noted, that court characterized the final comments of FHWA as "perfunctory" and a "rubber stamp." 362 F. Supp. at 631. We note however that the court was applying the strict non-delegation rule of *Greene County*, *supra*, now rejected by congressional action.

300 (9th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283-85 (9th Cir. 1974).

In light of the remand and this discussion, we reverse our prior decision and reverse the judgment of the district court.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT,
INC., ET AL.

v.

SECRETARY OF TRANSPORTATION, ET AL., APPELLANTS IN
No. 73-2629

THE VERMONT NATURAL RESOURCES COUNCIL, INC.,
ET AL., APPELLANTS

v.

CLAUDE S. BRINEGAR, ET. AL., No. 74-2168

ADAMS, Circuit Judge (dissenting in part):

There can be no doubt that the Court's previous decision in this matter (*Conservation Society I*)¹ was the impetus for the congressional action that resulted in the addition of a new section 102(2)(D) to the National Environmental Policy Act (NEPA).² But my understanding of the intent of the Congress, as it is expressed in the amendatory language and illuminated by the legislative history, diverges from that of the majority. In my view, the legislative purpose was to modify and clarify the rigid standard that Congress perceived *Conservation Society I* had established for federal involvement in the preparation and drafting of the environmental impact statement (EIS). The intent was not simply to overturn that ruling or to repudiate altogether the requirement of substantial federal control of the EIS. Because it is

¹ *Conservation Society v. Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974).

² Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424.

clear that the degree of federal control mandated by the modified statute has not been exercised in this case, I respectfully dissent from that portion of the majority opinion addressing the effect of the amendment to NEPA.

The roots of the question now before the Court find their grounding in *Greene County*.³ Construing the requirement of NEPA that an EIS be prepared "by the responsible federal official,"⁴ this Court there held that the statute prohibited the federal agency from delegating to a state agency the duty to prepare and draft the EIS. A major risk of such a procedure, specifically mentioned by the *Greene County* Court, is that the state agency's own interest in completion of the project in question might result in a biased EIS, one "based upon self-serving assumptions."⁵

Notwithstanding the refusal of five other courts of appeals to follow the *Greene County* rule,⁶ this Court adhered to it when the issue was again presented in *Conservation Society I*.⁷ The lack of objectivity that might result from permitting the state agency to prepare the EIS was again put forward as one of the bases for the Court's decision.⁸

In response to *Conservation Society I*, Congress amended NEPA by adding a new section 102(2)(D).

³ *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.) cert. denied, 409 U.S. 849 (1972).

⁴ NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970).

⁵ 455 F.2d at 420 (footnote omitted).

⁶ See 508 F.2d at 929 n. 3.

⁷ Since the date of that decision, two other federal courts have adopted the *Greene County* rule. *Swain v. Brinegar*, 517 F.2d 766, 778-79 (7th Cir. 1975); *Appalachian Mountain Club v. Brinegar*, 394 F.Supp. 105, 120-21 (D.N.H. 1975). See also *I-291 Why? Ass'n v. Burns*, 517 F.2d 1077, 1081 (2d Cir. 1975) (per curiam).

⁸ 508 F.2d at 931-32.

It provides that an EIS shall not be deemed insufficient solely because it was prepared by a state agency if "the responsible Federal official furnishes guidance and participates in such preparation [and] . . . independently evaluates such statement prior to its approval and adoption" The Supreme Court's order vacating our prior judgment and remanding the case¹⁰ places the meaning of the amendment to NEPA squarely before us.

A.

My analysis begins with the particular language Congress employed to amend NEPA. The amendment concerns only the preparation of the EIS; it does not affect the requirement of section 102(2)(C) of NEPA that the EIS be formally adopted by the federal official. It appears to permit an EIS to be prepared by a state agency if the federal agency discharges three specific responsibilities. The federal agency must (1) furnish guidance in the preparation of the EIS, (2) participate in the preparation of the EIS, and (3) independently evaluate the EIS prepared by the state agency before approving and adopting it. These three requirements indicate that the federal agency must remain involved in a substantial way both during and after the state agency's preparation of the EIS. To the same end, the amendment includes the statement that "[t]he procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire [EIS] or of any other responsibility under [NEPA]"

⁹ NEPA § 102(2)(D)(ii), (iii), Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424. Other aspects of the amendment are not relevant to the question before the Court.

¹⁰ 44 U.S.L.W. 3199 (U.S. Oct. 6, 1975).

To the extent that *Greene County and Conservation Society I* place an absolute prohibition upon delegation to the state agency of responsibilities to prepare the EIS, they have now been overruled by Congress. But my understanding of the congressional language is that a continuing and vital role by the federal agency in the preparation of the EIS is still contemplated.

B.

The meaning of the amendment is further clarified by a review of its legislative history. The Supreme Court has admonished that it is essential for courts to "place the words of a statute in their proper context by resort to the legislative history,"¹¹ since such history "illuminates the meaning of acts, as context does that of words."¹² The content of the extensive floor debates and of the reports submitted to the two chambers of Congress by their respective committees reinforces the conclusion that the statutory language itself requires major federal involvement in the preparation of the EIS.

Because committee reports are entitled to greater weight in statutory construction than are discussions on the floor of the Senate or the House,¹³ initial reference to the reports written in connection with the amendment to NEPA would appear to be in order.

The report of the House Committee on Merchant Marine and Fisheries was the first one dealing with the matter.¹⁴ The Committee reported favorably on

¹¹ *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972).

¹² *Cramer v. United States*, 325 U.S. 1, 33 (1945).

¹³ *United States v. United Auto Workers*, 352 U.S. 567, 585 (1957).

¹⁴ H.R. Rep. No. 144, 94th Cong., 1st Sess. (1975) [hereinafter cited as House Report].

H.R. 3130, the bill which was ultimately enacted.¹⁵ At the same time, it recommended against passage of H.R. 3787,¹⁶ a bill that had also been introduced in response to *Conservation Society I*. The report specifically accompanied only H.R. 3130 to the floor, although it also made references to H.R. 3787.

As reported out of Committee, H.R. 3130 had provisions virtually identical to those now contained in section 102(2)(D) of NEPA. "The purpose of the bill," the Committee wrote, "is to *clarify* the application" of NEPA to projects in which the state agency has prepared the EIS.¹⁷ The Committee's understanding of the critical phrase "furnishes guidance and participates in" was that it demonstrates an intent to "re-emphasize the basic precept of NEPA that Federal officials consider the environmental ramifications of proposed federal actions."¹⁸ In the committee's view, federal participation both extensive and effective is required in the drafting of the EIS.¹⁹ The phrase "independently evaluates" is "intended to assure that the Federal agency consider, critically review and, when appropriate, change and supplement" the work done by the state agency.²⁰ This analysis of the bill's provisions led the Committee to the conclusion that the bill would not disturb the "basic logic" of *Greene County*²¹—that delegation must be sufficiently

¹⁵ *Id.* 1.

¹⁶ *Id.* 2-3.

¹⁷ *Id.* 1-2 (emphasis added). The same view was expressed throughout the report. *See, e.g., id.* 4.

¹⁸ *Id.* 4-5.

¹⁹ *Id.* 5.

²⁰ *Id.*

²¹ *Id.* 6.

limited to maintain federal accountability for decisions that affect the environment.

Summarizing its understanding of the bill, the House Committee used the following forceful language:

[The bill] does not sanction a "rubber stamp" approach to Federal responsibilities, nor does it allow Federal functionaries to sidestep the other responsibilities placed upon them by law including, but not limited to, NEPA. What it does is to encourage adequate inputs of information by those best suited to develop that information, and to ensure that a continuing federal presence is mandated to fit that information into a rational and realistic planning and decisionmaking process. If enacted, H.R. 3130 would have this, *and only this*, effect.²²

The Senate Committee on Interior and Insular Affairs issued a report that made the same recommendations as the House Report.²³ The Senate Committee considered the purpose of H.R. 3130 to be the remedying of "administrative difficulties arising from" *Conservation Society I*.²⁴ The major administrative difficulty identified in the report is "the extent of permissible delegation of EIS preparation duties by the Federal agencies" ²⁵ Nowhere in the report is it suggested that total, or even major delegation to state agencies be allowed; on the contrary, the importance of a continuing federal role is emphasized throughout.

²² *Id.* (emphasis in original).

²³ S. Rep. No. 152, 94th Cong., 1st Sess. (1975) [hereinafter cited as Senate Report].

²⁴ *Id.* 2.

²⁵ *Id.* 3.

Express approval was given by the Senate Committee to the language of the House Report rejecting the notion that the bill allowed a "rubber stamp" approach to the responsibilities of the federal agency.²⁶ Emphasizing the importance of the role of the federal agency in the preparation of the EIS, the committee concluded that "[t]he involvement of the Federal official should come early and at every critical stage in the preparation of the EIS, and should be substantial and continuous."²⁷

Both the House Report and the Senate Report thus make clear the congressional intent to retain a considerable, though not exclusive, federal role in the development of the EIS.

Consideration of language offered to a congressional committee in the form of a bill, but rejected by the committee, often gives further insight into the meaning of the legislation actually enacted.²⁸ For that reason, the response of the committees to H.R. 3787, which "died" in the Senate committee, is worthy of analysis. H.R. 3787 was a proposed amendment to the Federal Aid Highway Act, and would have modified it by permitting an EIS to be prepared by the state agency if it were adopted by federal officials "after analysis and evaluation." Significantly, H.R. 3787 was limited in application—functionally, to federal aid highway projects, and geographically, to the three states of the Second Circuit.²⁹

Primarily because of these two restrictions in the bill, it stayed in committee in the Senate and never

²⁶ *Id.* 10, quoting with approval House Report 6.

²⁷ *Id.*

²⁸ See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

²⁹ Senate Report 5.

came to a vote on the Senate floor.³⁰ But another of the reasons for the Senate Committee's decision not to report the bill out is even more important to the meaning of the bill that was in fact enacted and which is before the Court today. The Committee believed that "one reading of H.R. 3787 is that it permits virtual total delegation of EIS requirements to the states. . . . [T]his degree of delegation is contrary to NEPA's most basic purpose of providing Federal accountability for the environment. . . . H.R. 3130 does not suffer from the same ambiguity, [and] would clearly not sanction such complete delegation. . . ." ³¹ The Committee's reasoning is a further indication of the desire on the part of Congress to maintain substantial federal control over the EIS.

The Senate debates on H.R. 3130 provide little aid in interpreting the bill. But the House debates indicate support by members from both sides of the aisle for retention of a strong federal role in the EIS, albeit with a modification of the standard that some Congressmen read in *Conservation Society I*. The author of H.R. 3130 specifically expressed a belief that the federal agency "must retain a large degree of the responsibility for the objectivity and completeness" of the EIS. In his mind, "close federal supervi-

³⁰ *Id.* 7. The House Committee on Merchant Marine and Fisheries rejected the bill for the same reason. House Report 2-4. The floor debates also demonstrate the concern for the problem. 121 Cong. Rec. H 2996 (remarks of Mr. Shuster), H 2999, H 3002 (remarks of Mr. Legget), H 3003-04 (remarks of Mrs. Sullivan), H 3004 (remarks of Mr. Forsythe), H 3005 (remarks of Mr. LaFalce) (April 21, 1975). Nonetheless, H.R. 3787 passed the House on April 21, 1975, by a vote of 275-99. *Id.* H 3009.

³¹ Senate Report 8.

sion . . . is crucial.”³² The chairman of the subcommittee that had first considered H.R. 3130 and the ranking minority member of the Committee observed that delegation of EIS responsibilities was contemplated by the bill only if accompanied by a full, independent evaluation of environmental factors by the federal agency.³³ Another minority member of the Committee explained to his colleagues that the bill was designed to clear up the ambiguity over whether the Court in *Conservation Society I* had held that the federal agency must do all the work in preparing the EIS, or had held only that preparation by the state agency is permissible if the federal agency evaluates the environmental factors independently. Enactment of the bill would demonstrate that Congress adopted the later interpretation, he stated, and would emphasize the requirement that the federal agency conduct its own independent evaluation of the information supplied by the state agency.³⁴

A reading of the debates and the two committee reports uniformly reinforces my understanding of the already unambiguous statutory language.³⁵ By

³² 121 Cong. Rec. H 3006 (remarks of Mr. LaFalce) (April 21, 1975).

³³ *Id.* H 3007 (remarks of Mr. Leggett), H 3004 (remarks of Mr. Ruppe).

³⁴ *Id.* H 3004 (remarks of Mr. Forsythe). Similarly, the Chairman of the Committee stated on the floor that the bill dealt only with the *extent* of delegation to be permitted. *Id.* H 3003 (remarks of Mrs. Sullivan). The continuing importance of the federal role under the terms of H.R. 3130 was also emphasized by Russell W. Peterson, the Chairman of the Council on Environmental Quality, in a statement delivered before the Senate Committee. Senate Report 16.

³⁵ *Cf.* Justice Frankfurter's reference to "the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956).

Public Law 94-83, Congress has now acted to allow the state agency to prepare the EIS under certain circumstances. But it has imposed a strict requirement of federal control in the process. The federal agency, according to the Congressional mandate, must guide the state agency during the preparation of the EIS. The federal agency must actively participate in that preparation. And the federal agency must review and evaluate the EIS independently, meeting its own responsibility to be fully accountable for the environmental ramifications of the proposed project. These are not duties that are fulfilled easily, or without substantial effort, input, and understanding. Congress has rejected the idea that the federal agency must perform all the work involved in preparing the EIS, but it has reaffirmed the principle that ultimate control must rest in federal hands.

C.

It is that set of conclusions, derived from a review of the legislation and its history, which in all deference leads me to a judgment different from that of the majority. I conclude that the federal involvement in the Route 7 EIS, as described in the factual findings made by the district court,³⁶ was inadequate even under the modified statutory provisions.

Among others, the following findings were made by the district court: (1) Arthur Goss, a planning engineer with the Vermont Highway Department (VHD), was the person "primarily responsible for the writing and preparation of the EIS. . . ." ³⁷

³⁶ The findings of fact are not challenged here.

³⁷ *Conservation Society v. Secretary of Transportation*, 362 F.Supp. 627, 629 (D. Vt. 1973).

(2) "[A] draft EIS was prepared by the VHD in consultation with but not under the supervision of" the Federal Highway Administration (FHWA).³⁸

(3) The draft EIS was "examined" and "considered" by FHWA officials. These officials made three suggestions regarding the draft, one of which concerned the environment.³⁹ (4) "There is no indication whatsoever that the FHWA or any of its employees conceived, wrote or even edited any section of or passage in the EIS. At the most there were informal chats touching upon the subject, together with [one] field trip [to the site of the proposed project] and subsequent 'review.'"⁴⁰

When faced with this factual record, I cannot conclude that the standard for federal involvement contained in the amendment to NEPA has been met. The FHWA did not guide VHD in the preparation of the EIS. It did not actively participate in the preparation of the EIS. There is no evidence that the FHWA's review of the draft EIS written by the VHD was an independent and critical evaluation of the environmental considerations inhering in the Route 7 project. The federal role was not, in my mind, the substantial one envisioned by Congress.

I would therefore affirm that portion of the district court's judgment which concerns the degree of federal involvement that NEPA requires in the preparation of the EIS, or, at most, remand the cause for further analysis by the district court in light of the amendment to NEPA.

³⁸ *Id.* at 629-30.

³⁹ *Id.* at 630 & n.1.

⁴⁰ *Id.* at 632.

Supreme Court, U. S.
FILED
FEB 25 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

—
No. 75-552
—

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL., *Respondents.*

—
No. 75-561
—

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL., *Respondents.*

—
On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit
—

BRIEF FOR PETITIONERS
AMERICAN ELECTRIC POWER SYSTEM, ET AL.
—

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL., *Respondents.*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONERS
AMERICAN ELECTRIC POWER SYSTEM, ET AL.

This Court granted the petitions for writ of certiorari and consolidated the cases in an order entered on January 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 75-552, App. A, 1A-73A) is reported at 514 F.2d 856. The order of the Court of Appeals granting an injunction pending appeal (*id.*, App. B, 75A-80A) is reported at 509 F.2d 533. The order of the Court of Appeals remanding the case to the District Court for further findings (*id.*, App. C, 81A-83A) is not reported. The opinion of the District Court setting forth its Findings of Fact and Conclusions of Law (*id.*, App. D., 85A-101A) and the District Court's Supplemental Findings Pursuant to Remand (*id.*, App. E, 103A-116A) are not reported. Those opinions, etc., hereinafter are cited by reference to the appropriate Appendix to the petition in No. 75-552.

JURISDICTION

The judgment of the Court of Appeals (*id.*, App. F., 117A-118A) was entered on June 16, 1975. Mr. Justice Rehnquist, by order of September 3, 1975 in No. 75-552, and Mr. Justice White, by order of September 9, 1975 in No. 75-561, extended the time in which to file petitions for writ of certiorari to and including October 10, 1975. The petitions were granted and the cases consolidated by order of this Court entered on January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 102(2)(C) of the National Environmental Policy Act of 1969 (hereinafter referred to as "NEPA"), 83 Stat. 853, 42 U.S.C. § 4332(2)(C), provides that:

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes; * * *

QUESTION PRESENTED

Federal law authorizes the Department of the Interior to permit leases of federal lands to private parties for coal mining under approved mining plans. In order to evaluate the environmental effects of its leasing program and decide upon future actions, the Department prepared a nationwide, programmatic environmental impact statement. Before issuing individual leases, the Department prepares an environmental analysis or impact statement, as appropriate, considering the effects of the lease, both individually and in combination with other leases. When necessary or appropriate, the Department also prepares impact statements for areas of intermediate size, such as the 7800 square mile "Eastern Powder River Coal Basin" within Wyoming.

The question presented is whether Section 102(2) (C) of NEPA authorizes a court to intervene in this decision-making process to require the federal petitioners to prepare in addition a separate "regional" environmental impact statement covering all development of coal and related resources within a four-state area, denominated by respondents as the "Northern Great Plains region," so long as the federal petitioners continue "contemplating" private applications, even though there neither is, nor is there under preparation, a recommendation or report upon, or a proposal for, a regional plan, program or other region-wide federal action with respect to that region.

STATEMENT OF THE CASE

1. *The Complaint and the Parties.* The complaint in this case (A. 5-26) was filed on June 13, 1973, by seven organizations (the respondents here) allegedly con-

cerned with the environment, on their own behalf and on behalf of their members, some of whom allegedly (A. 9) are "residents and land owners in the Northern Great Plains region" and "threatened" by damage to the environment in that area.¹ The Secretary of the Interior, the Secretary of Agriculture and the Secretary of the Army, together with the heads of four subordinate bureaus of the Interior Department, of one subordinate bureau of the Agriculture Department and of one subordinate bureau of the Army Department, were named as defendants, and they or their successors are the petitioners in No. 75-552. The petitioners in No. 75-561, upon whose behalf this brief has been filed, were permitted by the District Court to intervene as defendants. They include seven electric public utilities, who are dependant upon coal proposed

¹ The Court of Appeals recognized that, except for the Northern Plains Resource Council, none of the respondents "introduced any evidence to prove its standing," even though "standing to sue is an essential element of a cause of action and must be 'demonstrated' as well as 'alleged,'" but held that they could introduce such evidence on remand. (App. A, 20A-21A, n. 20). As to the NPRC, the Court of Appeals held that it had shown "minimal 'injury in fact'" which sufficed to give it "standing to bring the suit below, and to bring this appeal," even though that showing related only to "the proposed Westmoreland Resources coal mine on Crowced land" and the environmental effects thereof upon "members . . . who reside in the vicinity of the proposed mine" (*ibid.*). An environmental impact statement had been issued in regard to that mine and had been sustained by the United States District Court for the District of Montana (see *id.*, 10A, n. 15). While the Ninth Circuit subsequently reversed that decision in part, in *Cady v. Morton*, 8 ERC 1097 (9th Cir., 1975), it did not hold that a "regional" impact statement was necessary, and it authorized mining operations pursuant to the approved mining plan pending completion of such a statement which would cover the some 31,000 acres leased by Westmoreland rather than only the 770 acres to which the approved mining plan related.

to be mined within that area as fuel for the generation of electricity to meet future demands of their customers; four coal mining companies who have made substantial investments in facilities to develop coal resources within the area; three natural gas companies who need such coal to operate projected coal gasification plants for the production of synthetic natural gas; and an individual rancher, who owns lands within the area.²

Respondents' complaint did not attack or otherwise seek to review any particular approval of a mining lease or plan or other federal action, or the adequacy or validity of any particular environmental impact statement prepared in connection with recommended action upon an application for such a federal action. Rather, respondents claimed that the federal petitioners have violated Section 102(2)(C) of NEPA by failing "to prepare and consider a comprehensive environmental-impact statement concerning coal development in the Northern Great Plains region before issuing any coal prospecting permits or mining leases, approving any coal exploration or mining plans, . . . or taking any other actions concerning coal development in the Northern Great Plains region" (A. 23-24), and sought to enjoin all such actions pending completion of such a comprehensive "regional" environ-

² See the affidavits filed in the District Court on behalf of the various intervenor-petitioners and set forth in Vol. II of the Appendix in the Court of Appeals (R. 254-425). That Appendix will hereinafter be cited by "R." and the appropriate page number or numbers. The Crow Tribe of Indians and the Wisconsin Power & Light Company also intervened as defendants.

mental impact statement (A. 25-26).³ In short, as stated by respondents,⁴ their "case involves whether a comprehensive environmental statement, rather than individual statements, must be prepared before federal actions concerning the coal development can proceed."

The "Northern Great Plains region" to which the complaint thus relates is loosely defined therein to include "northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota" (A. 11), and apparently covers an area of approximately 90,000 square miles (R. 400).⁵ As the District Court found (F. 7, App. D, 88A), the "'Northern Great Plains region' as described by the plaintiffs is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project or action."

³ Respondents also claimed that the federal petitioners violated Sections 102(2)(A) and (D) of NEPA by failing to make "systematic interdisciplinary studies" of coal development in the region (A. 24-25). The rejection of that claim by the District Court (C. 5, App. D, 98A-99A) was not seriously challenged by respondents on appeal and was not disturbed by the Court of Appeals, and respondents did not petition this Court to review that holding. Hence, we do not further discuss that claim.

⁴ Plaintiffs' Statement in Response to Defendants' Statement of Material Facts (filed November 21, 1973), at p. 2.

⁵ The opinion of the Court of Appeals, on the other hand, generally relates to the "Northern Great Plains Province" which that Court described as covering "northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota, and extends southerly through strips of Nebraska and Colorado" (App. A, 2A). But the Court of Appeals also stated that "the relevant geographic area for development still seems somewhat uncertain (*id.*, 45A), and "that, absent abuse of . . . power, definition of the proper region for comprehensive development, and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees" (*id.*, 45A-46A, n. 33).

And, as that Court further found (F. 8, *ibid.*), there "is no existing or proposed Federal regional program, plan, project, or other regional 'federal action' *within the meaning of NEPA Section 102(2)* for the development of coal or other resources in the area defined by the plaintiffs as the 'Northern Great Plains region.'" (Emphasis by the Court.) There are no allegations in the complaint to the contrary.

2. *Proceedings in the District Court.* After discovery limited to interrogatories addressed to the federal petitioners inquiring as to whether they expected to approve any mining leases, etc., prior to June 30, 1974 (R. 25-26) and answers listing applications that might be acted upon prior to that date (R. 33-50, 147-157), and without filing any supporting affidavits, respondents moved on September 4, 1973 for summary judgment (A. 99-100). Both the federal petitioners (A. 116-117) and these petitioners (A. 113-115) filed cross motions for summary judgment, and these petitioners also filed a motion for judgment on the pleadings (A. 101-104). Supporting affidavits were filed by the federal petitioners (A. 118-149) and by various of these petitioners (R. 254-425). On February 14, 1974, the District Court (Judge Barrington D. Parker) entered a Judgment denying respondents' motion and granting petitioners' motions (R. 250), and issued a Memorandum Opinion setting forth its Findings of Fact and Conclusions of Law (App. D, 85A-101A).

The affidavit of the Secretary of the Interior denied that there was any federal plan or program to control coal development in the Northern Great Plains region (A. 119) and respondents did "not dispute the fact that the federal defendants have no plan concerning coal development in the Northern Great Plains region

in the sense of a definite, rational program upon which to base their decisions;" respondents "not only admit[ed] that no plan exists," but also "strongly emphasize[d] this point" as in their view it "is the very absence of any such plan which demonstrates so convincingly that NEPA has been violated."⁶ Hence, the District Court plainly was fully justified in making the finding, to which we have already referred (p. 7, *supra*), that there "is no existing or proposed Federal regional program, plan, project or other regional 'federal action' *within the meaning of NEPA Section 102(2)* for the development of coal or other resources in the area defined by the plaintiffs as the 'Northern Great Plains region.'" And, as the District Court further found (F. 31, App. D., 96A), there "is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by the plaintiffs as the 'Northern Great Plains region' are being planned and constructed as part of any integrated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in such area."

This does not mean, however, that the Government has ignored environmental considerations in the development of coal and related resources in the Northern Great Plains region (or elsewhere in the country). In 1973, the Interior Department commenced preparation of a national "coal programmatic" impact statement "on the proposed Federal coal leasing in the

⁶ Plaintiffs' Reply Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Defendants' Cross Motion for Summary Judgment and to Intervenor-Defendants' Various Motions (filed November 21, 1973), at p. 13.

United States," to "provide a national overview of the impact of the entire Federal coal leasing program on the quality of the human environment" (F. 15, *id.*, 90A); to "serve as the foundation and framework for subsequent environmental analyses and supplemental statements which may be prepared for subregions, geological structures or basins, or on an individual basis for coal management actions" (F. 16, *id.*, 90A-91A); and to assist in the "development of a planning system to determine the size, timing, and location of future coal leases in order to meet energy needs most effectively" (*ibid.*).⁷

In the meantime, since February 1973 and until the issuance "of the coal programmatic EIS in its final form and the development of the planning system," Interior has implemented a "short-term coal leasing policy" under which coal leases have been issued only if "coal is needed now to maintain existing operations" or "is needed as a reserve for production in the near future"; the "land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation" and in addition "an environmental impact statement covering the proposed lease [will be] prepared when required under" NEPA (F. 18, *id.*, 91A).⁸ In addition, Interior ceased issuing

⁷ That national coal programmatic impact statement was issued in final form on September 19, 1975 as the *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program*. A copy was lodged by the Government with the Clerk when it filed its petition.

⁸ There is "no evidence in the record of this case" that the federal petitioners have either taken or threatened to take action on individual projects for coal development within the area with-

"coal prospecting permits . . . until further notice" (F. 21, *id.*, 92A). This national, rather than regional, approach to a federal coal leasing policy accords with the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. §§ 181 *et seq.*, which applies to federal lands generally and does not distinguish those located in the Northern Great Plains region from those located elsewhere. And, Interior's trustee obligations to the Indian tribes counsels individual consideration of Indian lands (see pp. 13a-14a, *infra*).

The Interior Department has also initiated a number of studies which, while not congruent with respondents' Northern Great Plains region, either include or fall within the area of that "region." The North Central Power Study, initiated on May 26, 1970 "to investigate the potential for coordinated development of electric power supply in the north central United States" (F. 12, App. D, 89A)—covering all or large parts of 12 States and a minor part of three others (R. 340)—"was terminated at the end of Phase I" in 1972 when the "responses received did not indicate that a plan for coordinated development could be formulated" (F. 13, App. D, 89A-90A). The Wyoming-Montana Aqueducts Study "of potential water resource projects in southeastern Montana and northeastern Wyoming" (F. 14, *id.*, 90A) was suspended in 1972 and "held in abeyance pending the results of the NGPRP study" (F. 26, *id.*, 94A) discussed in the next paragraph.

The "NGPRP study" is the so-called Northern Great Plains Resources Program (F. 14, *id.*, 90A).

out preparing impact statements in compliance with NEPA or without complying with applicable state environmental laws (F. 30, *id.*, 95A-96A).

It was initiated by Interior on June 30, 1972 and conducted by an "interagency, Federal-State Task Force with public participation" (F. 23, *id.*, 93A), and relates to a five-State area, including Nebraska as well as Montana, Wyoming and the two Dakotas (A. 132). The purpose of that study "is to provide a tool for planning at all levels of government rather than to develop an actual plan" (F. 23, App. D, 93A), and the plan for the study made clear from the beginning that "the final report *will not recommend a preferred development plan* for the region," but instead "will provide information on the balancing of values and net benefits of alternative strategies so as to encourage and facilitate coordinated planning at all levels" (A. 136; emphasis in the original).⁹ Thus, these three governmental studies "are not part of a plan or program to develop or encourage development" of coal resources within the Northern Great Plains (F. 14, App. D., 90A).

On the basis of these and other findings and its understanding of NEPA, the District Court concluded, among other things, that the NGPRP study "is a study project and not a program for development" (C. 9, *id.*, 100A); that "[m]ultiple applications for Federal action in connection with individual private projects which are unrelated to each other, except that they involve resource development at some point within a multistate area, do not constitute a private or Federal regional plan or program for development, nor do they require the Federal Government to develop

⁹ That final interim report was issued on August 1, 1975. See Pet., No. 75-552, at p. 6. It did not in fact recommend a development plan for the region. See p. 20, *infra*.

a regional plan or program for development with respect to such multiple applications" (C. 4, *id.*, 98A); and that since "there is no existing or proposed regional program or project or other regional 'federal action' within the meaning of NEPA Section 102(2) for the development of coal or other resources in the 'Northern Great Plains region,' the complaint does not set forth a claim upon which relief can be granted" (C. 6, *id.*, 99A).¹⁰

Before argument or decision on respondents' appeal, the Court of Appeals, in an order entered *sua sponte* on October 14, 1974, remanded the case to the District Court to obtain the benefit, after a further evidentiary hearing, of findings in response to nine specific questions (App. C, 81A-83A). The District Court made supplemental findings in response to each of those inquiries (App. E, 103A-116A), but did not alter its prior findings (except as they were updated by the supplemental findings) or its conclusions of law.

¹⁰ The District Court also concluded that federal approval of individual projects or applications need not await the completion of "regional" studies not oriented to the particular project or application (C. 5); that the complaint did not present a justiciable case or controversy (C. 8) as it did not seek to review any final federal action (C. 7); that even if a regional program were being developed, NEPA would not prevent action upon individual applications prior to the completion of that program (C. 10); and that respondents would not be entitled to an injunction, even if they had established a good cause of action, "because there has been no showing in this case that irreparable harm would result in the absence of such an injunction or that the balance of equities favors the granting of such an injunction; and because the record discloses that such an injunction would cause irreparable injury to the defendants and to the public at large" (C. 11). App. D., 98A-101A.

Among other things, the supplemental findings established that the short term coal leasing policy and the suspension of the issuance of prospecting permits continued in effect, and no such leases or permits had been issued on lands within the Northern Great Plains region (F. 1-3); that a draft interim report of the NGPRP study had been issued on September 27, 1974 (F. 5); that Interior's position continued to be that, while it "is possible a decision will be made to prepare a statement for the entire Northern Great Plains region," the "information available [from such sources as the national coal programmatic impact statement, the NGPRP study and "the nature and proximity of pending and proposed projects"] may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of" NEPA "in a more satisfactory manner" (F. 6);¹¹ that Interior, Agriculture and the Interstate Commerce Commission had prepared an Eastern Powder River Coal Basin Impact Statement relating to four applications for approval of mining plans and related rights of way and an application for permission to construct a railroad line within that basin (F. 8); and that only two other environmental impact statements, one relating to a mining plan proposed by petitioner Westmoreland Resources and the other relating to a mining plan proposed by petitioner Peabody Coal Company, had been issued since February 17, 1973, in regard to

¹¹ In an affidavit filed with this Court in support of the Government's application for a stay pending review, Secretary Kleppe stated that this continues to be Interior's position (A. 194).

lands within the Northern Great Plains region (F. 9).¹²

While the District Court also found generally, in response to questions by the Court of Appeals, that the three impact statements "contain comprehensive descriptions of the cumulative impact of the governmental action on the surrounding area" (F. 9b) and "consider the ecological setting created by private activity in a general way with regard to demography and economic and social conditions within the areas covered by the statement" (F. 9c), the adequacy or validity of those impact statements is not at issue in this case and no findings or conclusions were made in that regard.¹³

3. *Proceedings in the Court of Appeals.* After argument but before decision of respondents' appeal, the Court of Appeals issued a *per curiam* order (pursuant to a motion by respondents) "that the Secretary of the Interior take no action concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement pending further order of this Court" (App.

¹² An impact statement regarding a mining plan proposed by the Amax Coal Company has since been prepared (A. 193; p. 18, *infra*). The Final Environmental Impact Statement for the Eastern Powder River Coal Basin in itself comprises six volumes and more than 3000 pages. According to the Statement, that Coal Basin includes almost five million acres (I-16), and contains some 12.4 billion tons of economically strippable, recoverable coal reserves out of a national total of about 45 billion tons (I-21 and 22).

¹³ As we pointed out in n.1, p. 5, *supra*, the adequacy of the statement relating to the Westmoreland mining plan has been litigated in the Ninth Circuit. The adequacy or validity of the Eastern Powder River statement and of the Peabody statement have never been challenged in the courts (see A. 192-193).

B, 75A-76A). The only stated justification for that order was "that such an injunction is required to maintain the status quo pending disposition of this appeal" (*id.*, 75A), despite a reasoned dissenting opinion by Judge MacKinnon (*id.*, 76A-80A).

The opinion and judgment of the Court of Appeals reversing the District Court and remanding for further proceedings were issued on June 16, 1975, over a dissenting opinion by Judge MacKinnon (App. A, 52A-73A). The lengthy majority opinion by Judge Wright (*id.*, 1A-52A) is replete with *dicta*, much of which appears to us to be highly questionable if not clearly erroneous. We shall not attempt to summarize it in detail except for those aspects critical to the decision below.

The Court of Appeals purported to accept "the facts as found by the District Court" (*id.*, 39A) and did not disturb the finding (which was not attacked by respondents)¹⁴ that there is no existing or proposed federal program, plan or other region-wide federal action in regard to the Northern Great Plains region. While the Court implicitly rejected petitioners' basic argument (and the holding of the District Court) that Section 102(2)(C) of NEPA does not require a regional impact statement in the absence of such a proposal for regional federal action, Judge Wright also did not adopt respondents' basic argument that the applica-

¹⁴ Indeed, respondents reasserted the position they had taken in the trial court (see pp. 8-9, *supra*) in which they "agreed that the federal government had no regional plan concerning the actions it was taking, but contended that the very absence of any such planning demonstrates even more convincingly that" NEPA "has been violated." Brief of Appellants, at p. 47.

tions by private parties for Government leases, permits, etc., were so interrelated "geographically, environmentally, and programmatically" that Section 102(2)(C) should be construed as requiring a comprehensive, regional impact statement despite the absence of a proposal for regional federal action.

Rather, the Court of Appeals based its holding that the trial court's "conclusion of law was in error" (*id.*, 39A) upon a novel construction of NEPA that was not urged by any party: that a comprehensive regional impact statement may be required because a plan for regional development is "contemplated" by the federal petitioners, even though there has been no proposal, and thus no recommendation or report upon a proposal, for such a plan. The Court thought that "the facts in the record and as found by the District Court established that regional development of the Northern Great Plains is contemplated by the federal appellees" (*id.*, 33A), stating that the various studies outlined above and particularly the NGPRP study (see *id.*, 34A-38A) afforded "overwhelming" evidence that "the federal appellees have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains" (*id.*, 34A). The Court thus held "that comprehensive major federal action is contemplated in the Northern Great Plains" and that the "District Court's contrary conclusion of law was in error" (*id.*, 39A).

The Court of Appeals stated that its "conclusion that major federal action is contemplated in the Northern Great Plains region does not mean, *ipso facto*, that a comprehensive regional impact statement is required," but held that such a "statement must precede [our emphasis] the 'recommendation or report on pro-

posals [emphasis by the Court] for * * * major Federal actions.'” *Id.*, 42A. This view that an impact statement must precede an agency’s recommendation or report on a proposal was gounded upon the court’s earlier *Calvert Cliffs* opinion (*id.*, 42A-43A) which construed Section 102(2)(C) “to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action,” including proceedings at the staff level prior to a recommendation, report or proposal by the agency itself.¹⁵ This view also gave rise to a “question of timing” because, while “the term ‘proposals’ does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer,” nevertheless “the ‘ripeness’ necessary before a statement is required is slight” (*id.*, 42A).

The Court of Appeals devised a complicated formula involving “four balancing factors,” derived with “minor modifications” from its prior *SIPI* opinion,¹⁶ “that must be analyzed and weighed to determine if the time is ripe for an impact statement” (*id.*, 43A). Its “analysis of the four balancing factors [was] somewhat inconclusive,” however, and the Court found “it unnecessary to reach a conclusive resolution of the question at this time” inasmuch as the final interim

¹⁵ *Calvert Cliffs’ Coord. Com. v. United States A. E. Com’n.*, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1118 (D.C. Cir., 1971).

¹⁶ *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Com’n.*, 156 U.S. App. D.C. 395, 481 F.2d 1079 (D.C. Cir., 1973). The timing issue in *SIPI* related to the point at which a programmatic impact statement was required in regard to a program that already existed in concrete form, rather than to the point at which such a statement was required prior even to the proposing of a federal program. See 481 F.2d, at 1082-1084, 1096.

report of the NGPRP study “is about to be issued” and the federal petitioners will then be in a position “to decide more definitely upon their role in the development of the Northern Great Plains” (*id.*, 47A).

Accordingly, the Court of Appeals remanded the case with directions that the federal petitioners “decide within 30 days of issuance of the NGPRP Interim Report, or the date of this opinion, whichever is later, whether to prepare a comprehensive, programmatic impact statement for the Region;” that the federal petitioners “report their decision, and the reasons for it, to the District Court;” and that, if they “decide against attempting to control development of the Northern Great Plains, they must also report, in detail, what the federal role in the Region will be” (*id.*, 49A-50A). Moreover, the Court directed that if the federal petitioners decide against preparing a regional impact statement, the respondents would be entitled “to present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement” (*id.*, 50A).

In addition, the Court of Appeals continued in effect its injunction against federal action upon the applications subject to the Eastern Powder River Basin impact statement until “the decision whether to prepare a comprehensive impact statement . . . is reached” (*id.*, 50A). While the petitions for writ of certiorari were pending, respondents moved the Court of Appeals to enlarge its injunction to include a prohibition against federal approval of a mining plan relating to the Belle Ayr South Mine of the Amax Coal Company, as to which a final environmental impact statement had been issued, and both the federal petitioners and these

petitioners moved the Court of Appeals to dissolve the existing injunction. In a November 7, 1975, order, the Court of Appeals denied the motions to dissolve and remanded respondents' motion to enlarge the injunction to the District Court. The federal petitioners then filed with this Court an Application for A Stay Pending Review on Petition for Writ of Certiorari, requesting a stay of the injunction entered by the Court of Appeals pending a decision by this Court on the merits. The January 12, 1976 order granting the petitions for writ of certiorari also granted that application for a stay of the injunction.

The application for a stay was accompanied by affidavits of Secretary of the Interior Kleppe and Federal Energy Administrator Zarb (A. 187-208). Among other things, Secretary Kleppe pointed out that the final interim report of the NGPRP study neither constitutes a "proposal for federal action nor does it propose a development plan for the area" (A. 191), and he made clear that the Interior Department now, as earlier, "does not have a plan or program to develop or contribute to the development of coal resources in the Northern Great Plains, the Rocky Mountain area, Appalachia, or in any other 'region' or 'province,' as such, in the country" (A. 195-196). He confirmed that approval of a particular mining plan or other proposed action "would not commit the Department to the approval of other mining plans or other coal related development proposals in the Northern Great Plains" (A. 198). And, he asserted that to "require the Department to decide on an impact statement, as the Court [of Appeals] does, where there is no plan or proposal for federal action, is to require that it ignore its authority, ignore its expertise and proceed

as an uninformed speculator filled with dreams and guesses" (A. 195).

Both Secretary Kleppe (A. 196-199) and Administrator Zarb (A. 206-208) emphasized and demonstrated in detail that further prolonged delay, such as would be involved if government actions upon applications for coal leases, mining plans, etc., are prevented pending preparation of a regional impact statement, would seriously undermine both government and private efforts to meet the nation's growing energy needs from domestic sources. Thus, Secretary Kleppe is "convinced that we have reached the point where further delay will seriously threaten the national interest" (A. 199), and Administrator Zarb affirmed that to "achieve necessary increases in coal production to meet national goals, prompt federal decisions on additional coal development are essential" (A. 208).

On January 26, 1976, Interior released a Statement on New Coal Leasing Policy by Secretary Kleppe, a copy of which is set forth as an Appendix to this brief. In that Statement, Secretary Kleppe announced, among other things, that he had "decided to adopt a new coal leasing policy based primarily on the proposal outlined in the Coal Programmatic Environmental Impact Statement, and to take other actions which combine to form a comprehensive National Coal Policy for the Federal lands" (App., 3a-4a). Among the "other actions" thus announced are a "competitive leasing system" under which "[n]o new prospecting permits will be issued" (*id.*, 9a); the implementation of new reclamation regulations which "will provide strict standards for all Federal coal mining activities, and . . . will be supplemented, where necessary, with site-specific stipulations for individual leases"

(*id.*, 10a); reiteration of the policy asserted in his affidavit to this Court (see p. 14, *supra*, and n.11 thereto) under which impact statements will be prepared for groups of proposed actions within a limited area or for individual proposals (*id.*, 10a-11a); continuation of the short-term leasing policy until "the new coal leasing system is completely implemented" (*id.*, 11a); and after such implementation the lifting of the "moratorium on new coal leasing" (*id.*, 14a).

SUMMARY OF ARGUMENT

A. Section 102(2)(C) of NEPA expressly provides that an environmental impact statement shall be included in a "recommendation or report on proposals for . . . major Federal actions" and that the statement shall set forth the environmental impact of the "proposed action." Under the plain language of the statute, therefore, a "regional" impact statement is not required unless and until the federal petitioners make a recommendation or report upon a proposal for regional federal action. No such recommendation, report or proposal has been made with respect to the Northern Great Plains.

B. The legislative history of Section 102(2)(C) confirms that the Congress intended that section to mean what it says. The analysis of that statutory provision in the relevant committee reports repeatedly refers to the fact that it is an agency proposal for major federal action, or recommendation or report thereupon, that gives rise to the requirement of an environmental impact statement, and that the statement is to concern the environmental impact of the proposed action. There is no suggestion in the legislative history that a "regional" impact statement is required in the absence

of an agency recommendation, report or proposal for regional federal action.

C. The recent *SCRAP II* decision by this Court squarely holds that Section 102(2)(C) does not require an impact statement if an agency has made "no proposal, recommendation, or report" upon the federal action in question. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320-321 (1975). The *SCRAP II* decision also confirms that the kind of environmental impact statement required depends upon the nature of "the 'federal action' being taken" (*id.*, at 322), and supports the propriety of the decision of the Interior Department to consider environmental issues raised by proposed mining or other individual projects in separate impact statements directed to such a proposal or group of proposals.

D. The statutory language, its legislative history, and the *SCRAP II* decision are as fatal to respondents' "geographic, environmental, and programmatic relationship" theory as they are to the theory of the court below that a regional impact statement may be required because a regional plan or program is merely contemplated. The only geographic or environmental relationship of individual federal actions within the area defined by respondents as the "Northern Great Plains region" is that the private projects involved necessarily are located and have any environmental impacts within the area, and the alleged "programmatic" relationship is simply the studies initiated by Interior. The lower courts generally have held that impact statements limited to a particular proposed action are permissible under NEPA even though broader studies are underway or claimed to be necessary; and even though the particular proposed action is part of

some broader program if it has independent utility so that its approval does not commit the agency to approval of other aspects of the overall program. In any event, whatever may be the nature of the "relationships" relied upon by respondents, there is no recommendation, report upon or proposal by the federal petitioners for regional federal action. Accordingly, a regional impact statement clearly is not required.

ARGUMENT

It is true that the Interior Department did not preclude the possibility that at some future time the information then available might demonstrate the desirability of preparing a regional impact statement for an area which could be described as the Northern Great Plains region (although not necessarily the area so described by respondents), and in that sense could be said to "contemplate" the possibility of developing a regional plan or program for coal development within the area.¹⁷ But it is also true that such "contempla-

¹⁷ The conclusion of the court below that "the federal appellees have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains" (see p. 17, *supra*) greatly overstates the situation, however. Interior made plain from the beginning of the NGPRP study that it was not intended to develop such a regional plan or program (see pp. 11-12, *supra*), so that the study upon which the court below primarily relied does not support its conclusion. And the North Central Power Study and the Montana-Wyoming Aqueducts study, upon which some reliance also was placed, were directed to electric power development or water resources (and thus only indirectly related to coal development), and in addition covered areas that varied widely from respondents' Northern Great Plains region and had been aborted long prior to completion. See p. 11, *supra*. Moreover, there is no evidence that the Agriculture and Army Departments (or their subordinate bureaus) have ever contemplated even the possibility of a regional plan or program for the Northern Great Plains. If the court below had not so overdrawn the true

tion" never proceeded to the point even of proposing the adoption of such a regional plan or program. Rather, Interior undertook the preparation of a national "coal programmatic" impact statement looking forward to the development of a national coal leasing policy, and has prepared impact statements upon individual proposed projects or upon groups of proposed projects located within a coal basin or other relatively limited area.¹⁸

We shall demonstrate that, in view of these circumstances, the plain language of Section 102(2)(C) of NEPA, its legislative history and the recent decision of this Court in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) (hereinafter cited as "*SCRAP II*"), make absolutely clear that a regional environmental impact statement is not now required. As this

situation, it presumably would and certainly should have recognized that a regional plan or program had *not* "progressed beyond the 'dream' stage into some tangible form" (App. A, 42A), and thus that the "time for an impact statement is" *not* "ripe" (*ibid.*) even under its four-factor balancing test.

¹⁸ This was the situation when Secretary Kleppe executed his recent affidavit (A. 192-195), as well as when former Secretary Morton executed his affidavit shortly after the commencement of this litigation (A. 120-121, 124) and at the time of the supplemental findings (A. 157-158, 163-164). See pp. 8-10, 14-15, 20, *supra*. The January 26, 1976 announcement by Interior not only denotes that a national coal leasing policy has now been adopted, but omits any mention of the possibility of preparing a regional impact statement for the entire Northern Great Plains area, while reaffirming the practice of preparing statements upon individual proposed projects or groups of several such projects within a limited "region" or area determined by basin boundaries, drainage areas, areas of economic interdependence, and other relevant factors. See pp. 21-22, *supra*, and pp. 10a-11a, *infra*. It now appears, therefore, that a regional impact statement for the entire Northern Great Plains is no longer even a recognized possibility for the foreseeable future.

Court held in *SCRAP II*, under the provision in Section 102(2)(C) that an impact statement is to be included "in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment," the "time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." 422 U.S., at 320 (emphasis by the Court). It is undisputed in this case that no proposal for a regional plan, program, project or region-wide federal action of any kind has been made (see pp. 7-9, *supra*), so there never has been a recommendation or report on such a proposal by the federal petitioners. Hence, the time for a regional environmental impact statement plainly has not arrived.

A. Under the plain language of NEPA § 102(2)(C), a regional impact statement is not required in the absence of a proposal for regional federal action.

Section 102(2)(C) plainly and unambiguously states that all agencies of the Federal Government shall "include in every recommendation or report on *proposals* for . . . major Federal actions . . . a detailed statement by the responsible official on," among other things, the "environmental impact of the *proposed action*," any "adverse environmental effects which cannot be avoided should the *proposal* be implemented," "alternatives to the *proposed action*," and any "irreversible and irretrievable commitments of resources which would be involved in the *proposed action* should it be implemented." (Emphasis added.)

It is difficult to perceive how the Congress could have stated more clearly that a final environmental im-

pact statement is not required unless and until there is a recommendation or report by a federal agency upon a *proposal* for major federal action, and that the environmental effects, alternatives, etc. to be considered in such a statement are those that relate to the *proposed action*.¹⁹ Consequently, since there has been no proposal for region-wide federal action relating

¹⁹ As this Court stated in *SCRAP II*, in "order to decide what kind of environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken." 422 U.S., at 322. See pp. 33-35, *infra*. This does not necessarily mean, of course, that the cumulative environmental impacts of other projects in the vicinity of the proposed project need not be considered as they may constitute environmental factors relevant to the impact of the proposed project. Indeed, *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 89 (2d Cir., 1975), held (questionably, we think) that an impact statement on a proposed project to dump spoil at a particular spot in Long Island Sound should have included consideration of the cumulative effect of other projects to dump at the same location which were "well beyond the stage of mere speculation," even though none had "gained final approval. . . ." But the Second Circuit also recognized that "an EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the [proposed] project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible" (*id.*, at 88); held that it need not "consider other projects so far removed in time or distance from its own that the interrelationship, if any, between them, is unknown or speculative" (*id.*, at 90); and further held that the cumulative environmental impacts need be considered only as they affected areas adjacent to the dumping place and need not extend to their effect "on the whole of Long Island Sound, a relationship as yet not understood" (*id.*, at 90). And see, *e.g.*, *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 230 (7th Cir., 1975), cert. pending, No. 75-951, which held that the cumulative effects of proposed public housing developments in other sections of Chicago need not be considered in determining whether the particular proposed project in a different part of that city constituted federal action significantly affecting the human environment. See, also, the cases summarized at pp. 38-42, *infra*.

to coal development in the so-called Northern Great Plains region, and thus no recommendation or report by a federal agency upon such a proposal, NEPA clearly does not require the federal petitioners to prepare a regional impact statement in that regard.

B. The plain meaning of § 102(2)(C) of NEPA is confirmed by its legislative history.

In view of the clarity of the language of Section 102(2)(C), we doubt if resort to the legislative history is appropriate. See, *e.g.*, *Packard Co. v. Labor Board*, 330 U.S. 485, 492 (1947). But however that may be, the legislative history demonstrates that the Congress meant what it clearly said in the statute.

The bill reported to and initially passed by the House did not contain an equivalent to Section 102(2)(C). See H. Rept. No. 91-378, 91st Cong., 1st Sess. (1969). However, the generally equivalent Section 102(c) in the bill reported to and initially passed by the Senate was said by the Report of the Senate Committee on Interior and Insular Affairs to require any agency "which *proposes* any major actions" to determine "whether the *proposal* would have a significant effect upon the quality of the human environment"; and if "the *proposal* is considered to have such an effect, then the recommendation or report supporting the "*proposal*" must include findings that, among other things, "the environmental impact of the *proposed action* has been studied," adverse environmental effects "cannot be avoided by following reasonable alternatives which will achieve the intended purposes of the *proposal*," and wherever "*proposals* involve significant commitments of resources" that are "irreversible and irretrievable," such "commitments are warranted." S.

Rept. No. 91-296, 91st Cong., 1st Sess. (1969), at 20-21 (emphasis added).

So, too, the Statement of the Managers on the Part of the House set forth in the Conference Report on the bill which was enacted, notes that Section 102 generally is "based on . . . the Senate bill" as there "was no comparable provision in the House amendment," and states that subsection (2)(C) requires every agency to "include in every recommendation or report on *proposals* for legislation or other major Federal actions, a detailed statement . . . on the environmental impact of the *proposed action*, any adverse environmental effects which can not be avoided should the *proposal* be adopted, alternatives to the *proposed action*" H. Rept. No. 91-765, 91st Cong., 1st Sess. (1969), at 8 (emphasis added). That report also states that the "conferees do not intend that the requirements for comment by other agencies should unreasonably delay the processing of Federal proposals" (*ibid.*).

These authoritative committee reports thus fully accord with the plain import of the language of Section 102(2)(C) that there must be a recommendation or report by a federal agency upon a proposal for major federal action before an impact statement is required, and that the environmental impacts to be considered are those that relate to the proposed action. The court below did not cite any legislative history to the contrary, respondents have not done so during the proceedings below, and we do not know of any contrary legislative history.²⁰ Hence, that history also fully sup-

²⁰ The bill reported to the Senate initially was passed unanimously without debate. 115 Cong. Rec. 19008-19013 (1969). Concern about possible conflicts with a bill reported by another committee resulted in the adoption of certain amendments, however,

ports our position that a regional impact statement is not required, regardless of whether a regional program or plan is "contemplated," since no regional program, plan or region-wide federal action has been proposed and no recommendation or report has been made in regard to such a proposal.

C. This Court's SCRAP II decision holds that an environmental impact statement is not required prior to an agency's recommendation or report on a proposal for major federal action.

This Court's *SCRAP II* decision, which was issued after the decision of the court below in this case, establishes beyond any doubt that the Court of Appeals

before the bill was sent to conference. See *id.*, 29046-29065. Those amendments are not important for present purposes (although we note that one changed the bill's requirement that the agencies make "findings" on the environmental impacts of proposed actions to the requirement carried over into Section 102(2)(C) of NEPA of merely a statement in that regard, see *id.*, 29052-29053). But the occasion of those changes gave rise to several statements referring to the fact that impact statements are to be included in recommendations or reports on proposals for major federal actions and are to relate to the environmental impacts of the proposals thus acted upon (*id.*, 29052-29053, 29055, 29058). The House bill (which did not contain an equivalent of Section 102(2)(C)) was received in the Senate on the same day and gave rise to further such references (*id.*, 29068, 29083), including an analysis of the relevant provision in the Senate bill similar to the one made in the Senate Report (*id.*, 29085). The explanation of the Conference Report (which the Senate adopted unanimously) occasioned an additional such reference (*id.*, 40416) and a similar analysis (*id.*, 40420). The House also agreed to the conference report without recorded objection, and after a short debate which included a repetition of the analysis of Section 102(2)(C) contained in the Conference Report (*id.*, 40923-40924). There was no controversy about this aspect of Section 102(2)(C) during the debates in either body, and no suggestion by anyone that the Congress intended to require an impact statement in the absence of an agency recommendation or report upon a proposal for major federal action.

erred in not affirming the dismissal of respondents' complaint.

In that case, a three-judge district court had held (in an opinion by Judge Wright) that the Interstate Commerce Commission had violated NEPA in approving a proposal by the railroads for a general rate increase applicable to recyclables as well as to other commodities, because among other things, an "oral hearing which the ICC chose to hold prior to its October 4, 1972, order [approving the proposal with minor exceptions] was an 'existing agency review process' during which a final draft environmental impact statement . . . should have been available . . ." 422 U.S., at 319-320. This Court held "that the District Court erred in [so] deciding . . ." *Ibid.*

This Court's reasons for that holding were stated as follows (422 U.S., at 320-321):

"NEPA [§102(2)(C)] provides that 'such statement . . . shall accompany the proposal through the existing agency review processes' (emphasis added [by the Court]). This sentence does not, contrary to the District Court's opinion, affect the time when the 'statement' must be prepared. It simply says what must be done with the 'statement' once it is prepared—it must accompany the 'proposal.' The 'statement' referred to is the one required to be included 'in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment' and is apparently the final impact statement, for no other kind of statement is mentioned in the statute. Under this sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing

a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972, report, the ICC had made no proposal, recommendation, or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the statute required a statement was the time of the ICC's report of October 4, 1972—sometime after the oral hearing." (Emphasis by the Court; footnotes omitted.)

Consequently, in accordance with the plain language of the statute, this Court squarely held that NEPA does not require an impact statement by a federal agency until "the time at which it makes a recommendation or report on a *proposal* for federal action," except perhaps when the agency itself "initiates federal action by publishing a proposal and then holding hearings on the proposal" There is no such requirement prior to the agency's recommendation or report upon a proposal made by a private party—such as the railroads' proposal for a rate increase—since the agency itself has made "no proposal, recommendation or report." That holding applies *a fortiori* to this case where there never has been either an agency or, indeed, a private proposal for regional federal action regarding coal development in the so-called Northern Great Plains region, and, of course, no agency recommendation or report upon such a proposal.²¹

²¹ In a footnote to the passage from *SCRAP II* which we have quoted in the text, this Court specifically disapproved, since "they would appear to conflict with the statute," the *Calvert Cliffs* decision by the District of Columbia Circuit and two decisions by the Second Circuit "which read the requirement that the statement accompany the proposal through the existing agency review proc-

Another aspect of the *SCRAP II* decision is relevant here, since it further confirms the propriety under NEPA of the practice of the federal petitioners of analyzing the environmental impacts of individual projects involved in a particular application or group of applications in statements that relate to such proposed project or projects rather than in a comprehensive overall regional statement for the entire Northern Great Plains "region."

This Court held that the three-judge district court also was "plainly incorrect" in its further holding that the impact statement eventually prepared by the ICC in regard to the general rate increase was deficient "because it inadequately explored the underlying rate structure and inadequately explored the *extent* to which the use of recyclables will be affected by the rate structure." 422 U.S., at 326 (emphasis by the Court). In so holding, this Court pointed out that "in order to decide what kind of an environmental impact statement need be prepared, it is necessary first to

esses differently" 422 U.S., at 321 n.20. The *Calvert Cliffs* decision, in another opinion by Judge Wright, had broadly construed NEPA as requiring that "environmental issues be considered at every important stage in the decision making process concerning a particular action" and thus held that the environmental impact statement must be given consideration during proceedings at the staff level upon a private application before any recommendation, report or proposal by the agency itself (the Atomic Energy Commission) for federal action upon such application. *Calvert Cliffs' Coord. Com. v. United States A. E. Com'n*, *supra*, 449 F.2d at 1118. That interpretation of NEPA, which this Court repudiated in *SCRAP II*, provided the principal underpinning for both the decision of the three-judge district court which this Court reversed in *SCRAP II* (see 371 F. Supp., at 1299-1300) and the decision below which we seek to have reversed in this case (see pp. 17-18, *supra*).

describe accurately the 'federal action' being taken." 422 U.S., at 322. This accords, of course, with the language and legislative history of NEPA which show that the environmental impacts to be considered are those which relate to the proposed action. See pp. 26-30, *supra*. Thus, the ICC appropriately could limit the scope of its impact statement regarding the general rate increase to the "few environmental issues" directly relevant to such general action, and consider those environmental issues raised by the rates charged for transportation of a particular commodity or category of commodities—such as recyclables—in future proceedings directed to the validity of those specific rates. 422 U.S., at 322-326.

Hence, the contrary decision of the three-judge district court constituted "an entirely unwarranted intrusion into an apparently sensible decision by the ICC to take much more 'limited' action in [the general rate] proceeding and to undertake the larger action," insofar as environmental issues raised by rates on recyclables are concerned, "in a *separate* proceeding better suited to the task." 422 U.S., at 326 (emphasis by the Court). So, too, the decision by the court below in this case constitutes an entirely unwarranted intrusion into the decisions of the federal petitioners as to the most appropriate proceeding in which to consider the environmental issues raised by a particular mining plan or other proposed coal-related project. It is just as "sensible" for the Interior Department to consider the environmental impacts of such individual proposals or groups of proposals in proceedings directed specifically to the issue of whether such proposal or proposals shall be approved, rather than in some general "regional" proceeding or impact statement, as

it is for the ICC to consider the environmental impacts of rates on recyclables in a proceeding directed specifically to the validity of such rates. There is no warrant for intrusion by the courts in either situation.²²

D. There is no basis for respondents' contention that a regional impact statement is required by NEPA § 102(2)(C) because all federal actions relating to coal development within the Northern Great Plains are "geographically, environmentally, and programmatically" related.

The District Court found, among other things, that there "is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by plaintiffs as the 'Northern Great Plains region' are being planned and constructed as part of any integrated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in such area." See p. 9, *supra*. Hence, insofar as appears, each such project or proposed or potential project can stand alone and has independent utility.

Respondents did not contend (or introduce evidence) to the contrary in the lower courts. Respondents did contend that all past and future such individual projects within the area necessarily are "geograph-

²² Indeed, Interior also has prepared a national coal programmatic impact statement in connection with the national coal leasing policy that has now been announced, much as the ICC did with respect to the general rate increase involved in *SCRAP II*. The adequacy of that impact statement and any other issues that might be raised by that statement or by the new national coal leasing policy, of course, are not issues that have been raised in this case. So, too, there is no issue in this case concerning the adequacy or validity of any impact statement—or agency approval—regarding a particular proposed project or group of proposed projects.

ically" related in the sense that they are or will be located at some point within the area; and "environmentally" related in the sense that environmental impacts of projects located within the area necessarily are felt within the area; and "programmatically" related in the sense that Interior's NGPRP study, North Central Power study and Montana-Wyoming Aqueducts study are concerned to some extent with that area.

Of course, whatever area may be defined as a "region," the very fact of that definition will assure that all federal actions within the region as so defined are "geographically" and "environmentally" related in the sense with which those terms have been used by respondents. Respondents' contention, therefore, basically is an argument that the studies initiated by Interior suffice in themselves to require all the federal petitioners to prepare a comprehensive, regional impact statement.

Even apart from the fact that each of those studies differs in scope from each other and covers an area which is either larger or smaller than the "Northern Great Plains region" as defined by respondents (see pp. 11-12, *supra*), respondents' argument is plainly erroneous. However that argument may be stated, it still remains true that none of the federal petitioners has reported upon, recommended or proposed any region-wide federal action. Hence, as we have demonstrated, the statutory language, its legislative history and this Court's *SCRAP II* decision conclusively establish that a comprehensive, regional impact statement is not required. Those authorities are just as fatal to respondents' "geographic, environmental and programmatic relationship" theory as they are to the

"contemplation" theory of the court below. Indeed, that court's theory is merely a more sophisticated extension of respondents' theory, as the court's view that a regional plan or program is "contemplated" by the federal petitioners is grounded upon the same studies that respondents rely upon to show an alleged "programmatic" relationship. See p. 17, *supra*.

Respondents' argument and the decision below also are inconsistent with decisions by several of the courts of appeals. In those decisions, which we shall briefly summarize, the courts have upheld impact statements limited to a particular proposed action even though a broader "regional" study was underway or argued to be necessary; or even though the proposed action was a part of some larger project, program or plan, where the proposed project had independent utility so that its approval did not commit the Government to other aspects of the overall project, program or plan.²³

²³ The only contrary decision of which we are aware is *Conservation Soc. of S. Ver., Inc. v. Secretary of Tran.*, 508 F.2d 927 (2d Cir., 1974), which was relied upon by the Court of Appeals in this case (see App. A, 28A-29A). It held that an impact statement for a federally-aided highway project was inadequate, even though the road to be constructed "is admittedly a project with local utility" and "no plan presently exists for constructing" a more extensive "superhighway," because "an ultimate . . . superhighway is the expectation of state agencies with the knowledge and cooperation of the federal government." *Id.*, at 934-935. In so holding, the Second Circuit—like the court below in this case—relied upon the view that an impact statement must be prepared prior to the agency's recommendation, report or proposal. Hence, that decision also appears to be contrary to this Court's *SCRAP II* decision as well as to the language and legislative history of NEPA. And, this Court granted a petition for writ of certiorari (No. 74-1413), vacated the judgment of the Second Circuit and remanded "for further consideration in light of" *SCRAP II*, 44 U.S.L.W. 3199 (October 6, 1975).

Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir., 1973), upheld Interior in preparing separate impact statements upon three proposals for the construction of electric-generating plants in the Southwest, despite contentions that the statements were inadequate because Interior had not awaited completion of a Southwest Energy Study so as to take into consideration the regional environmental factors disclosed by that study.²⁴ The Ninth Circuit pointed out, among other things, that "it is doubtful that any project could ever be initiated" if an "impact statement can never be prepared until all relevant environmental effects were known," as at "any point in time, there are likely to be any number of studies underway concerning a host of environmental or other societal problems." The Court held that it would not "substitute its judgment for that of the Secretary, who is charged by NEPA with preparing a thorough statement of the environment consequences of a proposed project, as to what particular information will be required to complete that statement." *Id.*, at 1280-1281.

Environmental Defense Fund, Inc. v. Armstrong, 356 F. Supp. 131 (N.D. Cal., 1973), aff'd, 487 F.2d 814 (9th Cir., 1973), cert. den., 416 U.S. 974 (1974), declined to enjoin the New Melones Dam project in the Central Valley of California for which an impact statement had been prepared, despite insistence that

²⁴ The Southwest Energy Study "was designed to evaluate the problems created by further development of coal-fired electric power in the Southwest" (*id.*, at 1279). And thus was a "regional" study for that area similar to the NGPRP study in regard to the Northern Great Plains area.

the statement was inadequate because "a comprehensive study of the [entire] Central Valley Project [should] be made viewing the system of state and federal water projects as an integrated unit." *Id.*, at 139. The court stated that while it "agrees with the wisdom of so doing, NEPA itself does not so require," since:

"So long as each major federal action is undertaken individually and not as an indivisible, integral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. Plaintiffs' suggestion that there is need for a comprehensive study of the Central Valley Project should be addressed to the Congress, and not to be Court." *Id.*, at 139.

Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir., 1973), held that an impact statement upon a 14-mile segment of a federally aided highway project was inadequate because that segment "does not have an independent utility of its own, which would require that it end in . . . present major highways or cities." *Id.*, at 19. The Court also asserted that the statement need not cover the entire planned project as such "plans usually are and should be visionary, subject to extensive modification and dependent to a large degree upon the availability of both state and federal funds," and a "state . . . should not be placed in a vise in which it can do nothing to take care of present traffic needs . . . until an extensive time-consuming study has been made of the entire plan." *Ibid.* See, also, *Swaim v. Brinegar*, 517 F.2d 766, 776 n.12 (7th Cir., 1975), and *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975), which approved the "independent utility" test ad-

vanced in the *Indian Lookout* case for application to impact statements relating to other highway projects.²⁵

Sierra Club v. Callaway, 499 F.2d 982 (5th Cir., 1974), upheld an impact statement limited to the Wallisville Project for the construction of a reservoir and navigation channel that, although "made compatible in certain of its features" with a much larger Trinity River Project, was not "a mere component, increment, or first segment of Trinity," but rather was "a separate viable entity" which "should be examined on its own merits" so that the "Wallisville EIS should speak for itself." *Id.*, at 990.

Sierra Club v. Stamm, 507 F.2d 788 (10th Cir., 1974), rejected a contention that an impact statement for the Strawberry Aqueduct and Collection System was "too narrow in scope, and should be a final statement at least

²⁵ In *Citizens Against the Destruction of Napa v. Lynn*, 391 F. Supp. 1188 (N.D. Cal., 1975), the court upheld an environmental statement on a plan to redevelop the central business district of Napa, rejecting a contention that the plan should have covered the entire redevelopment program or plan for that city, as the particular 12-block project (out of an overall total of 33 blocks) would not necessitate completion of the remainder of the overall project and had an independent justification. *Id.*, at 1192-1195. In so holding the court analyzed the "highway" cases upon some of which the plaintiffs primarily relied (as did respondents in the courts below). While "[l]anguage from several of the legion of highway cases may be taken out of context to compel the preparation of broad, all-inclusive impact statements for all government interference with the environment . . . , the soundest approach to the highway cases in a non-highway context is to extract the common sense tests the courts in those cases employed." *Id.*, at 1193. Those tests are whether construction of the particular segment "would coerce the construction of an additional segment" rather than having an "independent justification" in that it "has such a substantial local purpose that it can stand alone" *Id.*, at 1193-1194.

for the entire Bonneville Unit, if not indeed for the entire Central Utah Project" (*id.*, at 790) which had been authorized by the Congress as "a plan to collect, develop and divert water in the Bonneville and Uinta Basins of central Utah for municipal, industrial, agricultural and recreational purposes" (*id.*, at 789). Since the finding by the trial court—that the Strawberry System "has an independent utility of its own" and can "operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project"—had "adequate support in the record" (*id.*, 791), the Tenth Circuit "agree[d] with the trial court that the Strawberry system in and of itself constitutes a 'major Federal action' and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system" (*id.*, at 792-793).

Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir., 1974), rejected a contention that an impact statement upon the First Phase of the two-phase Teton Dam and Reservoir Project authorized by the Congress was "fatally inadequate because it does not discuss the environmental impact of the Second Phase" of that overall Project. *Id.*, at 1285. The "First Phase is substantially independent of the Second" in that it would not "be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken," and thus is unlike the situation in those "cases which hold that a series of interrelated steps constituting an integrated plan must be covered in a single impact statement." *Ibid.* See, also, *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir., 1975), in which the Ninth Circuit upheld an impact statement in

regard to a highway project, even though the statement did not consider the environmental impacts of a canal project from which dirt used as fill for the highway was to be excavated. The "proper test . . . does not depend upon the interrelation of the projects per se," but "upon whether completion of one project will inevitably involve an 'irreversible and irretrievable commitment of resources' to the second." *Id.*, at 299.

Finally, *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225 (7th Cir., 1975), cert. pending, No. 75-951, upheld a determination by the Department of Housing and Urban Development that an impact statement was not required for an 84-unit urban renewal project, rejecting a contention "that HUD violated its duty under NEPA to consider the comprehensive environmental impact of the 1500 unit scattered-site housing program [in Chicago of which the 84-unit project was one part] when it confined its environmental analysis to the 84 units the agency has thus far approved." *Id.*, at 230. "While a given action 'may be more appropriately evaluated in a single environmental clearance,' HUD is not compelled to aggregate several projects if, in its judgment, evaluation of the aggregate is not feasible;" and even though "there are environmental considerations common to all sites that are best considered in the aggregate, the fact that by design the sites are scattered through the neighborhoods of the city counsel for separate consideration of discrete sites." *Ibid.* See, also, *Trinity Episcopal School Corporation v. Romney*, 523 F.2d 88, 95 (2d Cir., 1975), another housing development case, in which the Second Circuit "agree[d] with the trial court that an environmental impact statement is not required for the Area as a whole" as each "section will have its own individual problems."

The majority of the court below sought to distinguish the cases summarized above (except for those not yet decided) on the ground that they "involved the propriety of an injunction against an individual project pending completion of a regional EIS or other study" and that "[n]one of the cases involved a direct challenge to the need for a regional EIS." App. A., 39A n.29. But the respondents in this case have sought injunctive relief against all actions by the government petitioners in regard to individual coal-related projects (see pp. 6-7, *supra*), and the court below in fact enjoined action upon those projects involved in the Eastern Powder River Coal Basin impact statement (see pp. 15, 19, *supra*). Furthermore, the majority of the court below conceded that if "the federal appellees decide to prepare a comprehensive regional EIS for the Northern Great Plains, it is, of course, of no consequence to us what form it takes" as the "EIS may be incorporated in already planned statements for individual projects" as well as "subdivided into subregional statements, or . . . issued as a whole." App. A., 48A n. 36. Hence, it makes no practical difference whether the issue in terms relates to the need for a "regional EIS," as here, or to the need for a more comprehensive environmental analysis in the impact statement for a single project as was contended in the cases discussed above.

In short, as Judge MacKinnon stated in dissent, the majority's distinction of the cases in other circuits "is a classic example of a distinction without a difference" as surely "it is not reasonable to suggest that the decisions reached by other courts are somehow less sound because they were able to assess the need for a regional EIS in the context of a challenge to the sufficiency of

a specific statement whereas this court is considering a challenge in the abstract without ever determining that a particular EIS does not comply with the dictates of NEPA." App. A, 65A. And, as Judge MacKinnon also stated, "[d]evelopments in one part of the Northern Great Plains are essentially independent from developments elsewhere in the region," as "development of some portion of the coal reserves does not irretrievably commit the federal agencies to permit development of the entire reserve," and "it is clear that even the largest of the proposed projects will not have an environmental impact on the entire Northern Great Plains Region." App. A., 63A. See, also, *id.* n. 12, 64A.

Thus, the overwhelming weight of authority in the lower courts establishes that, in the circumstances involved here, an environmental impact statement limited to a particular proposed project is sufficient. A comprehensive "regional" statement is not required, either separately or as a part of the statement upon a particular proposed project, as each such project has independent utility and the approval of one will not necessitate approval of others. But however that may be, this Court's *SCRAP II* decision leaves no possible doubt that a regional impact statement is not required since none of the federal petitioners has reported upon, recommended, or proposed any region-wide federal action in regard to the development of coal and related resources within the so-called Northern Great Plains region.

CONCLUSION

For the reasons stated above, the Judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the Judgment of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

DEPARTMENT OF THE INTERIOR

News Release

OFFICE OF THE SECRETARY

For Release 10:00 A.M. EST January 26, 1976

**NEW FEDERAL COAL LEASING POLICY
TO BE IMPLEMENTED UNDER CONTROLLED CONDITIONS**

Secretary of the Interior Thomas S. Kleppe today announced a new comprehensive federal coal leasing policy to promote orderly development of public energy resources.

Kleppe said the new policy, which would be implemented on a gradual and logical basis, was designed to: help keep national energy costs down by permitting timely and efficient development of federal coal by leasing only when needed; provide a proper balance between the national policy requirement for utilization of the nation's most abundant fossil fuel and preservation of the environment; discourage private holdings of excessive reserves of federal coal by implementation of diligent development regulations requiring timely development or relinquishment; provide for issuance of preference rights leases under a new definition of commercial quantities; return fair market value to the taxpayer through competitive bid sale of coal leases; and public participation in the federal coal decision process.

The Secretary said the new policy would include these steps:

—adoption of the Energy Minerals Activity Recommendation System (EMARS), which requires careful analysis to determine need for coal and to minimize environmental impacts;

—adoption of a totally competitive leasing system, under which no new coal prospecting permits will be granted;

—development of final regulations governing conditions under which mining operations and post-mining reclamation must take place;

—preparation of regional environmental impact statements, wherein groups of coal and coal-related actions are proposed in a defined geographical area;

—continuation, until the new coal leasing system has been implemented, of the short-term leasing criteria that has been in effect since February, 1973, to allow leasing for ongoing mining operations or to meet near-term reserve requirements;

—promulgation of effective diligent development standards;

—establishment of a firm definition for commercial quantities to determine whether leases will be issued to preference right lease applicants under the Mineral Leasing Act; and,

—removal under controlled conditions of the federal coal leasing moratorium that has been in effect since early 1971.

Kleppe reaffirmed his support of Indian self-determination in leasing of tribal coal resources, a significant portion of western coal reserves.

Three key points affected adoption of the policies and procedures announced—the first of which was the guiding principle that only those deposits needed would be leased. Second, he said, was recognition of the fact that some of the deposits already leased were costly to mine and market when compared to potentially low-cost coal not yet offered for lease. Third, the Secretary said, was the need to encourage diligent development of leases through appli-

cation of regulations and incentives that discourage retention of non-producing leases.

STATEMENT ON NEW COAL LEASING POLICY

January 26, 1976

Denver, Colorado

The vast Federal coal resources of the American west constitute a vital source of energy for a Nation too heavily dependent on foreign sources of petroleum. Coal is our most abundant fossil fuel, yet it provides only 17% of the energy Americans consume each year. It is obvious that these Federal coal deposits must be developed, so that coal can take its rightful place in the Nation's energy matrix. It is also obvious that this resource must be developed in a sound, rational, and environmentally prudent manner. As manager of this public resource, the Department of the Interior must establish a firm and realistic coal policy. The elements of this policy are:

1. A proper balance between the national interest in the use of coal and the National interest in the protection of the environment.
2. A fair market return to the taxpayer on the sale of this public resource.
3. The leasing of the coal that is needed but only when it is needed.
4. The leasing of that coal whose value exceeds the total cost of production including environmental costs.
5. The elimination of excessive lease holdings.
6. Public participation in the Federal coal decision process.

We have therefore decided to adopt a new coal leasing policy based primarily on the proposal outlined in the

Coal Programmatic Environmental Impact Statement, and to take other actions which combine to form a comprehensive National Coal Policy for the Federal lands. This policy must be firmly in place and thoroughly understood by the industry, the States, and the public at large before actual leasing can begin.

The single most important element of a more rational Federal coal policy is the implementation of a new coal leasing *process*. But to fully understand what the process is and why it is necessary, it must be viewed in context with other actions the Department has taken or intends to take. These include: new and more stringent standards for diligent development of Federal coal leases, an updated definition of the term "commercial quantities: in order to dispose of pending preference right lease applications, and realistic and effective surface mined land reclamation standards. Together these elements combine to form the foundation of a more rational and believable Federal coal policy incorporating a process in which all interested parties, the government, the industry, the affected States and the public itself have a role.

BACKGROUND

Early in 1971, coal leasing on the Federal lands was halted because large amounts of coal were already under lease, little coal was being produced, and there was widespread concern that the Department's leasing processes were not environmentally adequate. In February 1973, this moratorium was modified to permit leasing when coal was needed to maintain existing mining operations, or as a reserve against production in the near future. This limited leasing was allowed only when the environment could be protected and when the provisions of the National Environmental Policy Act had been compiled with. Only ten leases have been issued under these criteria; all were for extensions of existing operations.

For the past four years, the Department has been working to devise a new policy and new procedures that will permit resumption of Federal coal leasing, as the need arises, and in a way that is responsible to the taxpayers who own the resource, to the energy consumers who will benefit by its use, to the environment, and to the public at large. In my view the early establishment of a firm and comprehensible coal leasing process is clearly in the best interests of all concerned.

A part of the process of developing a new coal policy was the creation in June of 1972 of the Northern Great Plains Resource Program, a cooperative effort of the Departments of Interior and Agriculture, the Environmental Protection Agency and the States of Montana, Wyoming, Nebraska, North Dakota and South Dakota. Seven inter-agency working groups spent two years gathering data on resource and environmental values in the five-State area, using these data to project the implications of various assumed rates of development of the coal resource. Their report was issued in August of 1975.

Simultaneously, the Bureau of Land Management designed EMARS, the Energy Minerals Activity Recommendation System, a procedure by which the various offices of the several Federal agencies involved in coal leasing, in cooperation with State agencies, will gather and combine resource and environmental information, regional and national policy considerations, and input from the general public to provide recommendations to the Secretary on where, when, and how much coal should be offered for lease.

A third element has been the ongoing revision of regulations under which Federal coal leasing and mining activities would take place. The Bureau of Land Management and the Geological Survey have developed proposed standards governing mining and reclamation practices on the Federal lands. These standards are designed to meet

the highest justifiable environmental criteria. They have been published for comment, and after final revisions, will be promulgated before any new leasing takes place.

During this time, the Department prepared the Coal Programmatic Environmental Impact Statement, which was released in September of 1975. This statement is intended to be a general analysis of the environmental impacts of major leasing alternatives. It will not, however, satisfy the requirement for future site-specific or regional environmental analyses as individual coal-related actions are proposed.

A fifth element in the development of this program has been the process for consultation with the governors of the western States and their staffs. Several meetings have been held with the governors or their representatives. We intend to continue close consultation with the Western Governors' Regional Energy Policy Office on all aspects of Federal coal development in the west.

Finally, the development of a national energy policy announced by the President in February 1975 and the exhaustive study entitled "Project Independence Blueprint" gave us a truer picture of the Nation's future energy needs and the role coal must play in meeting these goals.

From these actions, and from detailed and spirited debate both within and outside the Department, have come the policies I am announcing today.

ANNOUNCEMENT DECISION

I have decided to take steps to implement a new policy for Federal coal leasing and to adopt a process based primarily on the proposal contained in the Coal Programmatic Environmental Impact Statement. These are the steps I intend to take:

1. *The adoption of EMARS*, the Energy Minerals Activity Recommendation System, the actual leasing process.

2. *The adoption of a totally competitive leasing system*, under which no new coal prospecting permits will be granted.

3. *The development of final regulations governing conditions under which mining operations and post-mining reclamation must take place.*

4. *The preparation of regional environmental impact statements*, where groups of coal and coal-related actions are proposed in a defined geographical area.

5. *The continuation of the short-term criteria*, under which leases can be granted for continuation of existing mining operations or where needed to fulfill short-term production needs until the new leasing is fully implemented. Such leases will be granted only when NEPA provisions have been met and where environmental conditions warrant.

6. *The promulgation of diligent development standards* to assure development or relinquishment of Federal coal resources in a timely manner.

7. *The establishment of firm "commercial quantities" criteria with which existing preference right lease applications can be granted or denied.*

8. *The lifting of the moratorium on Federal coal leasing* so that, as the need arises, we will be able to offer leases for sale.

THE ENERGY MINERALS ACTIVITY RECOMMENDATION SYSTEM (EMARS)

The adoption of EMARS is the touchstone of the new Federal coal policy. Its purpose is to tell us where coal will be needed, so we can consider whether it should be offered for lease. It will also tell where coal should not be leased and where the environmental consequences of coal development or where other uses of the land outweigh

the need for the coal. It is designed to assure that the public receives a fair market return for the coal that is sold.

The first element of EMARS is the area by area Management Framework Plan (MFP) prepared by the Bureau of Land Management. This is a basic land use plan, prepared with local State and Federal participation which identifies and inventories not only the minerals, but other values, such as agriculture, grazing, wildlife, recreation and water resources. It also analyzes the compatibility and conflicts of these varying land uses. The information contained in the Management Framework Plans will be the basis against which proposals to lease coal will be judged.

The second major element of EMARS is a system of nominations through which industry, State and local governments, environmental groups and the public at large will periodically identify which tracts should or should not be leased. By comparing these nominations with the information contained in the Management Framework Plans, we will make initial judgments on what areas, if any, should be considered.

A third element is environmental analysis. When a leasing action is considered, we will undertake a thorough analysis to determine the effects of the proposed action on the environment. In accordance with the National Environmental Policy Act, when the proposed action is determined to be a major Federal action, an environmental impact statement will be prepared before any specific lease or group of leases is offered.

A fourth major planning element is a system for calculating the economic value of the individual coal deposits which are being considered for lease. The U. S. Geological Survey is developing improved methods for determining such values on coal tracts. The purpose of this valuation system is two-fold: We must be certain that the value of

the coal itself is great enough to warrant environmental risks inherent in the mining activity, and we must ascertain the value of the resource in order to determine the adequacy of competitive bids.

These four elements—Management Framework Plans, nominations, environmental analysis and tract valuations—combine to help us make a decision about where and when leasing should take place, and whether such leasing is in the public interest. No amount of planning is absolutely foolproof, but we believe that the system we have described will help us make a knowledgeable and a rational decision whether the value of the coal is sufficient to warrant the paying of costs, quantifiable and unquantifiable, monetary and environmental. These comparisons of cost and value will vary from time and from place to place, but it is essential that we make careful, case-by-case comparisons, using all the pertinent information available to us at the time.

The nub of the process, however, is the use of the marketplace itself, for the market will ultimately determine what coal, if any, will be leased and developed. After all the careful planning and analysis, the competitive lease system, with bonus bidding, will be the ultimate determining factor in the sale and development of Federal coal.

This EMARS process will be published in the Code of Federal Regulations, prior to its implementation.

COMPETITIVE LEASING SYSTEM

We have determined that all future leasing of Federal coal will be made under competitive leasing system. No new prospecting permits will be issued under our new policy. However, existing preference right lease applications will be processed in a timely fashion, giving priority to those applications which meet the short-term criteria described elsewhere in this document. In addition, I have

directed the Department to study the feasibility of regulations which would enable small business concerns to compete more effectively in the new system.

SURFACE MINED LAND RECLAMATION REGULATIONS

Coal mining on Federal lands is subject to the Code of Federal Regulations. In September 1975, the Department published, along with a draft environmental impact statement, proposed new regulations governing both mine operations and post-mining reclamation for the mining of Federal coal. These new regulations, when implemented, will provide strict standards for all Federal coal mining activities, and they will be supplemented, where necessary, with site-specific stipulations for individual leases. The proposed regulations are patterned after legislation which is under consideration in the Congress, with specific changes to conform to Administration objectives. They are designed to minimize the adverse environmental effects of actual mining operations and require that the mined land be restored. We intend to allow application of State standards on Federal coal lands, where those standards are at least as stringent as the proposed Federal standards, and where State standards are not prohibitive to the development of the public resource. After further revision based on consultation with the States and other parties, and after completion of the Final Environmental Impact Statement, we intend to publish these regulations as final. I will not permit initiation of leasing until after these regulations have been promulgated.

REGIONAL ENVIRONMENTAL IMPACT STATEMENTS

In many cases, the significance of any proposed leasing goes beyond the issuance of an individual lease or the approval of a mining plan. Our leasing will frequently set the course of development for geographic areas encompassing both Federal and non-Federal lands. For this reason, as determined by the Secretary, several coal leases,

or mining plans, may be covered in a single regional environmental impact statement, rather than by multiple environmental impact statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of economic interdependence, and other relevant factors.

In areas where a regional environmental impact statement if [sic] warranted, if an individual action meets the short-term criteria, and where approval is required before completion of the regional statement, an environmental assessment will be made. If, as a result of the assessment, the proposed action is determined to be major in scope, approval of that action will be withheld pending completion of the regional environmental impact statement.

In other cases, single coal leases or mining plans will be analyzed to determine whether or not the proposed action constitutes a major Federal action and an environmental impact statement is required under the National Environmental Policy Act.

SHORT-TERM OR EMERGENCY CRITERIA

Until the new coal leasing system is completely implemented, we will maintain a mechanism in which certain proposed leasing actions can be approved where they meet defined critical production needs. Individual leases may be granted only under the following conditions and terms:

1. The proposed lease must be necessary for continuation of an ongoing mining operation, or
2. The proposed lease must be necessary as a reserve for production in the near future, generally to fulfill production requirements within five years.
3. In all cases, these special actions will be approved only when the provisions of the National Environmental Policy Act have been met. An environmental assessment

must be made to determine whether the proposed action is major in scope. If so, an environmental impact statement will be completed.

4. This limited leasing will be granted only when the environment can be adequately protected and the land can be adequately reclaimed.

DILIGENT DEVELOPMENT

This new coal program will contain requirements for assuring the timely development—or relinquishment—of the Federal coal resources. There are today some 16 billion tons of Federal coal already under lease. On the surface, it would appear that this amount is sufficient for years to come. However, in reality we do not know whether that amount is sufficient, or if the coal we have leased is suitable for mining. We do know that some of this coal, perhaps as much as one-third, is not suitable for mining for environmental and economic reasons. However, the enormity of this leased coal clouds the leasing issue. We have therefore promulgated standards which will require diligent development—or relinquishment—of new or existing coal leases. Under these standards, a lessee must have mined at least one-fortieth of the reserves of his lease (2½%) within ten years. However, an added major impetus to diligent development will be an economic incentive. The lessee must pay advance royalties beginning in the sixth year of the lease, based on a production schedule that would exhaust the deposit in forty years. In addition, the production royalty rates have been substantially increased so that the normal charge will be eight percent of the value of the coal at the mine-mouth. This rate may be varied, up or down, for good causes in particular circumstances, but in no case can the royalty rate be less than five percent. These new standards will assure that the coal most likely to be produced will be produced in a timely fashion and that coal under lease which is not readily producible will be returned to the Federal estate.

PREFERENCE RIGHT LEASE APPLICATIONS

In addition to the coal already under lease, there are some ten billion tons of Federal coal for which preference right lease applications have been made. In order to dispose of these pending applications, a realistic definition of the term "commercial quantities" must be made under the Mineral Leasing Act of 1920. Heretofore, the standard we have applied has been simply whether the mineral existed in the proposed lease area and whether it was mineable under present technology. That standard is out of date in today's business atmosphere.

In undertaking the development of a coal mine, any prudent businessman would have to consider the costs of actual mining, the cost of transporting his coal to market and the cost of meeting environmental protection requirements. These cost considerations would be weighed against the value of the coal itself. Therefore, we have published a proposed definition of the term "commercial quantities" which considers those factors which a prudent businessman must take into account. With the final promulgation of this definition, we will be able to determine which preference right lease applications should or should not be granted under the terms of the Mineral Leasing Act from a practical and prudent business standpoint. Moreover, with these final definitions, we can begin to process the preference right lease applications now pending. Our first priority will be to process those applications which meet the short-term criteria described above.

COAL LEASING POLICY ON INDIAN LANDS

Indian coal resources represent a significant portion of western coal reserves. However, our estimates clearly indicate that the public lands contain adequate reserves to meet national needs. There is no reason for Indian tribes to fear that their resources will be developed without their full concurrence.

As trustee for the various tribes, our responsibility is to see that their desires with respect to coal development are met.

Should a tribe decide to lease coal, it will be the Department's responsibility to support that decision, providing it is determined to be in the tribe's best interests.

The Department will therefore approve coal leasing on Indian lands where:

1. the tribal or individual Indian landowner desires to dispose of the coal;
2. the terms and conditions of the lease are in the best interest of the Indian landowner; and
3. appropriate environmental protection and reclamation safeguards are imposed on the lessee.

LIFTING THE MORATORIUM

With the implementation of the policy we have set forth, and with the coal leasing process firmly in place and understood by all those concerned, there is no need to continue the moratorium on new coal leasing which was established nearly four years ago. We want to emphasize, however, that the lifting of the moratorium does not automatically mean that leasing will resume in the immediate future. The process, EMARS, once fully implemented, will tell us whether new leasing is necessary. The policies and procedures are designed to lease only those deposits that are needed for production. The control points which we have built into the process, including Management Framework Plans, nominations, environmental analysis, resource valuations, competitive leasing and diligent development are all designed to assure only the coal which is necessary is leased. We are not in the business of leasing coal for speculative purposes. We are in the business of seeing that the Federal resources are produced for the Nation's benefit.

FOR ARGUMENT

Supreme Court, U. S.
FILED

APR 13 1976

RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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IN THE
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No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
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On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

The question originally presented in this Court was:

whether the National Environmental Policy Act (NEPA) permits federal agencies to take numerous major federal actions related to the massive development of coal resources in the Northern Great Plains without first preparing and considering a regional environmental impact statement related to the cumulative environmental impacts of federal actions within the entire region.

Since this Court granted the writs of certiorari, the Department of the Interior has adopted the policy of preparing regional environmental impact statements pursuant to the National Environmental Policy Act when it proposes or takes related actions, in a particular geographical area and has applied this policy to coal development in the Northern Great Plains. As a result, respondents submit that the original question is no longer in controversy and that the question presented is as follows:

Whether the appropriate geographical area for preparation of a regional environmental impact statement under the National Environmental Policy Act is the entire Northern Great Plains region rather than smaller portions of that region.

STATEMENT OF THE CASE

Procedural Background

Respondents¹ brought suit on June 13, 1973, in the District Court for the District of Columbia seeking a declaratory judgment, mandamus and injunctive relief against the federal petitioners relating to the development and exploitation of the vast coal reserves of the

¹ Respondents are the Sierra Club, National Wildlife Federation, Northern Plains Resource Council, League of Women Voters of Montana, Montana Wilderness Association, Montana League of Conservation Voters, and League of Women Voters of South Dakota.

Fort Union and Powder River formations located in eastern Montana, northeastern Wyoming, western North Dakota, and western South Dakota—the Northern Great Plains region. The federal actions which respondents sought to enjoin included issuance, grant or approval of coal prospecting and exploitation permits, coal mining leases, coal mining plans, water options and contracts, diversions of water from and placement of structures in navigable waterways, and permits for rights-of-way.

Respondents claimed that the federal petitioners had violated, and were continuing to violate, Sections 102(2) (A), (C) and (D) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2) (A), (C) and (D), by taking these actions related to coal development in the Northern Great Plains region without preparing and considering a comprehensive environmental impact statement analyzing the cumulative effect of these actions on a region-wide basis, and without preparing and considering systematic interdisciplinary studies and a study of appropriate alternatives.

The district court granted the motions of the federal petitioners and the industry petitioners who had intervened (hereafter AEP petitioners) for summary judgment on February 14, 1974. The court concluded, *inter alia*, that since the federal petitioners had not developed an overall regional program or plan for their numerous actions related to coal development in the Northern Great Plains, NEPA did not require preparation of a comprehensive, regional environmental impact statement. Fed. Pet. App. D pp. 98A-99A.²

² "Fed. Pet. App." refers to the appendices contained in the Petition for a Writ of Certiorari filed by the federal petitioners; "Br. Opp. App." refers to the appendices attached to the Brief of Respondents in Opposition; "AEP Br. App." refers to the appendix attached to the Brief for Petitioners American Electric Power System, *et al*; "App." refers to the appendix prepared for this Court and "Ct. of Appeals App." refers to the appendix prepared for the court of appeals and part of the record now before this Court.

During the pendency of the suit in the district court, the Secretary of the Interior had announced a coal leasing policy which would permit federal coal leasing only under specified, limited conditions pending review and analysis of federal coal leasing procedures. Affidavit of Secretary Morton, App. 120-121. On June 17, 1974, following the filing of an appeal from the decision of the district court, the Court of Appeals for the District of Columbia Circuit (Judges Leventhal and Tamm) denied respondents' motion for an injunction pending appeal because the requested injunction was too broad. However, the court noted that "the spectre of significant harm to large tracts of valuable wilderness still remains" and that permitting coal development activity in the region could allow "consequential and perhaps irreversible action to be taken." The court therefore urged that "substantial restraint be exercised in the granting of authority for coal development activity pending a disposition of this case on its merits." The court further granted respondents' motion to expedite the appeal. Br. Opp. App. A, pp. 2a-3a.

After a *sua sponte* remand to the district court to update the record and answer certain factual questions (Fed. Pet. App. C, pp. 81A-83A; Fed. Pet. App. E, pp. 103A-116A), the court of appeals heard oral argument on December 17, 1974. On January 3, 1975, it granted respondents' motion for a limited injunction to prevent the imminent approval of four mining plans and railroad rights-of-way. Fed. Pet. App. B, pp. 75A-80A.

On June 16, 1975, the court of appeals issued its decision on the merits of the case. It noted that numerous actions had already been taken by federal officials involving coal leases and water options to allow coal development in the Northern Great Plains and that hundreds of applications for coal leases and permits, water

options, mining plans, and right-of-ways were pending. Fed. Pet. App. A, pp. 5A, 8A-13A. While at the time of the court of appeals' decision the Secretary had announced a moratorium on further coal leasing except on a limited basis pending completion of the Northern Great Plains Resources Program study and of the national Coal Programmatic environmental statement (*id.* at 6A-8A), the court was nonetheless aware of the activities of other federal agencies in the region (*id.* at 8A), of the "loop-holes" in the announced restrictions which would allow further coal development in spite of the apparent moratorium (*id.* at 9A-11A), and of the likelihood in the near future of a "flood of applications" for mining leases, mining plans, rights-of-way over federal lands, navigable waterways, and national forests, and for water rights throughout the Northern Great Plains (*id.* at 13A). Once the pending studies were completed, "the massive development of the Northern Great Plains will begin." *Ibid.*

Looking at these federal activities, the court of appeals reached two major conclusions. The first was that the cumulative effect of the many federal decisions, inter-related in terms of purpose, geography, and environmental impact, amounted to a de facto federal program for coal and energy development. The court specifically rejected the argument of the federal petitioners, "that a statement is required only when the Government has itself designated the activities at issue a 'program.'" *Id.* at 28A. The court refused to allow the application of NEPA to depend on the label chosen by the government: "[w]hether a comprehensive impact statement is required cannot turn simply on whether the agency has denominated a comprehensive series of actions a 'program.'" *Ibid.*

The second conclusion was that the government itself had for some years treated the Northern Great Plains

region as a discrete area in terms of coal development, had acknowledged the need for comprehensive study and planning in the area, and had recognized the need for the federal government to control development. *Id.* at 34A-38A. The court reviewed the numerous statements of high federal officials calling for comprehensive regional development of the Northern Great Plains and the several studies of the region which had been undertaken for this purpose. *Ibid.* The most recent, and most comprehensive, study undertaken by the Department of the Interior, the Northern Great Plains Resources Program, had been initiated to avoid "engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options." Memorandum of Secretary Morton, June 30, 1972 (App. 130), quoted at Fed. Pet. App. A, p. 6A. The court of appeals concluded that the combination of the government's own treatment of the region with the multitude of federal actions there, past and anticipated, resulted in a de facto program and a regional major federal action within the meaning of NEPA. Fed. Pet. App. A, p. 39A.

Having determined the need for an environmental statement and its necessary scope, the court of appeals then turned to the next question, that of the appropriate timing. *Id.* at 42A. The court said that "[p]reparation of a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action." *Id.* at 42A. The court then set out four criteria for determining whether the federal action at that time was ripe for preparation of an impact statement. *Id.* at 43A. Two of these, the availability of information on the effects of

implementing development and the severity of environmental effects caused by such development, the court concluded were satisfied. However, the immediate role of the government was not so clear, in light of the moratorium established by Secretary Morton and the imminent completion of the Northern Great Plains Resources Program. Therefore, the court remanded the case to the district court to allow the federal petitioners the opportunity, after issuance of the Northern Great Plains Resources Program report, to decide upon the role they would play in the region and whether they must prepare a comprehensive environmental statement. *Id.* at 47A-49A. Thus, the question of the appropriate time for an impact statement was left to depend on the decision concerning further action which the government would make.

At the same time as it decided the merits, the court of appeals continued the temporary injunction of January 3, 1975, in order to "preserve, in large part, the *status quo*" pending the federal petitioners' decision whether to prepare a comprehensive impact statement for the Northern Great Plains. *Id.* at 50A-51A. On November 7, 1975, the court of appeals denied the motions of the federal and AEP petitioners to dissolve the temporary injunction and, at the same time, remanded to the district court respondents' motion to modify that injunction in order to prevent approval of the proposed mining plan for the Amax mine in the Eastern Powder River Coal Basin of Wyoming. Br. Opp. App. B, pp. 4a-5a. On November 11, 1975, the Secretary of the Interior decided that the Amax mining plan would be approved. On November 14, 1975, the district court enjoined that approval only insofar as it extended beyond a period of two years or the final resolution of this litigation. Br. Opp. App. C, pp. 6a-7a.

By order entered January 12, 1976, this Court granted the petitions for writ of certiorari and the motion filed

by the federal petitioners for a stay of the injunction entered by the court of appeals.

Factual Background

Present Character of the Northern Great Plains. One of the world's largest known coal basins, the Fort Union and Powder River coal formations, underlie large areas of northeastern Wyoming, eastern Montana, western South Dakota, and western North Dakota.³ The federal government owns or controls more than 60 percent of the estimated total coal reserve in the Northern Great Plains region.⁴ In addition to the reserves under direct federal control, considerable coal is found on Indian lands which may be leased only with the approval of the Secretary of the Interior. Further, because of the checkerboard pattern of surface and subsurface ownership throughout much of this region, decisions of the federal government to lease or not lease will often effectively determine the future of adjacent private lands as well. The federal government thus has control over most of the coal reserves of the region, regardless of ownership.⁵

³ Final Environmental Impact Statement: Proposed Federal Coal Leasing Program, p. 2-48 (1975) (hereafter Coal Programmatic EIS).

⁴ Effects of Coal Development in the Northern Great Plains, Report of the Northern Great Plains Resources Program, p. 8 (1975) (hereafter NGPR Program Report). A copy of this report has been lodged with the Clerk of this Court. This report, which was earlier considered to be an interim report, was prepared over a period of 3 years by a staff consisting of officials from a variety of federal agencies. The final report will be not prepared because Secretary Kleppe abolished the program in January 1976.

⁵ The Bureau of Land Management of the Department of the Interior states that "the Federal Government influences the development of nearly 80 percent of all western coal resources." Program Decision Option Document, The Proposed Federal Coal Leasing Program, December 16, 1975, p. 3 (hereafter PDOD). A copy of the PDOD has been lodged with the Clerk of this Court.

The Northern Great Plains region presently has very little industry and a sparse population.⁶ Much of the area is isolated from main highways or railroads and most of the present population derives its livelihood from ranching and farming. The region is well known for its abundant wildlife and fish and it has attracted increasing numbers of people who admire the beautiful scenery and utilize the superior opportunities for hunting, fishing and other outdoor activities.⁷

The present character of the Northern Great Plains region is described in the NGPR Program Report (pp. 45-47, 99):

Most of the portion of the NGP area encompassed by this study is characterized by broad horizons of open, rolling terrain.

* * *

It is a country of wind. Wind that quickly dries soils and drifts snow during the blizzardy winters. It is a dry country; only 2 percent is covered by the waters of lakes and streams. Annual precipitation ranges from 10 to 26 inches. Much of plains region only receives 12 to 16 inches of precipitation in a year. * * * [O]ut of 37 years, 1 had been humid, 1 moist subhumid, 5 dry subhumid, 25 semiarid, and 5 arid. The arid and some of the semiarid years are probably too dry to permit revegetation of disturbed land without irrigation.

The NGP is a land of big cattle and wheat ranches. * * * Seventy percent of the area is pasture and range; 26 percent is cultivated for wheat, barley, flax, rye, oats, corn, alfalfa, and sugar beets, but

⁶ NGPR Program Report, p. 45.

⁷ Bureau of Land Management, Powder River Basin Resources Briefing Report (May 1973), p. 5 (hereafter Powder River Basin Report).

"wheat and meat" are the main agricultural products. In 1971, a little less than one-twelfth of all U.S. wheat was produced in the region. Less than 3 percent of the land is irrigated.

There are few people, only 4.4 per square mile, compared with Iowa and Ohio having 52 and 263 persons per square mile respectively. * * * There are Indians: the Sioux, the Northern Cheyenne, Crow, Assiniboine, Gros Ventre.

* * *

Some 2.5 million acres of the 92 million acres that comprise the NGP study are inventoried as "wild lands," some have potential for inclusion in the National Wilderness System.

* * *

The big game of the NGP are another resource of national significance. * * * Hunting is a part of the NGP culture, with many nonresidents participating in the activity. * * * The high quality of hunting found in the NGP is directly related to the relatively low pressure of hunting on game populations and the millions of acres of relatively unaltered land surface that provides suitable habitat. * * *

Other kinds of recreationists visit the NGP as they move to areas on its fringes, such as Yellowstone National Park or the Black Hills. The Badlands in Theodore Roosevelt National Memorial Park, for example, attract large numbers of visitors to its unique scenic features.

All these resources are important to many more people than just those of the region. They are national resources, and many are the last vestiges of what this country once was in its untouched natural state.

* * *

The NGP region is relatively free of large-scale air pollution problems. Extremely clean air is a trade-

mark. Visibilities of 50 miles or more are commonplace. "Big Sky" is more than the motto of a single State—it is a concept treasured by all people who live in the region and one quickly grasped by visitors.

The court of appeals well summarized the present status and the potential effects of intensive coal development on this region (Fed. Pet. App. A, p. 45A):

Briefly put, a region best known for its abundant wildlife and fish, and for its beautiful scenery, a region isolated from urban American, sparsely populated and virtually unindustrialized, will be converted into a major industrial complex.

Past and Pending Federal Actions in the Northern Great Plains. The presence of enormous amounts of coal in the Northern Great Plains region, much of it close to the surface and therefore readily removed by surface mining techniques, concentrated in one geologically definable area, has attracted a rush to use this resource for highly intensive energy development. The federal government has already undertaken a large number of actions in the Northern Great Plains area in furtherance of this coal and energy development. Fourteen federal coal leases covering 90,000 square miles, issued prior to the effective date of NEPA, are presently operating.* Since that effective date, January 1, 1970, 29 coal leases, covering 137,802 acres, have been issued; 97 prospecting permits, which give the prospector the automatic right to obtain leases so long as "commercial quantities" of coal are found, covering 685,280 acres have been of coal are found and which cover 685,280 acres have been granted and water-option contracts for 601,000 acre-feet

* Fed. Pet. App. A, p. 5a, note 4.

* Answers of Secretary Morton to Plaintiffs' Interrogatories, Ct. of Appeals App. 49-50; Supplemental Answers of Secretary Morton,

authorizing strip mining had been approved prior to the court of appeals' decision¹⁰ and a fifth, for an extension of the Amax mine in northeastern Wyoming, was approved in November 1975.¹¹ Subsequent to the action of this Court staying the injunction imposed by the court below, four more mining plans were approved in February 1976.¹²

The Department of the Interior has recently announced that it will cease granting coal prospecting permits which give the right to a lease.¹³ However, the Department presently has before it some 80 preference right lease applications based on existing permits¹⁴ which the Secretary states "must be acted upon."¹⁵ In addition, as of November 1974, there were 47 outstanding prospecting permits, covering some 3 billion tons of coal.¹⁶ There are also pending some 42 competitive lease applications, 19 applications for coal-related rights-of-way, 41 applications for water option contracts, and two applications for permits for structures in navigable rivers.¹⁷ The Department of the Interior has stated that it has a list of "over 80 parties

Ct. of Appeals App. 149-156; Exhibit 1 to Federal Defendants' Motion for Summary Judgment, Ct. of Appeals App. 173-188.

¹⁰ Fed. Pet. App. A, p. 10a, note 13.

¹¹ Br. Opp. App. C, p. 7a.

¹² Fed. Br. 21.

¹³ Department of the Interior News Release, January 26, 1976, AEP Br. App., pp. 2a, 7a.

¹⁴ Fed. Pet. App. A, p. 12A.

¹⁵ Testimony of Secretary Kleppe before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee, p. 9 (see App. B, p. 9a below).

¹⁶ App. 159.

¹⁷ Fed. Pet. App. A, pp. 8A-9A, including notes 7, 8 and 9, 12A-13A.

that are interested in obtaining Federal coal leases, primarily in the Northern Great Plains."¹⁸

Potential Development in the Northern Great Plains. The Report of the Northern Great Plains Resources Program describes the potential coal and coal-related development in the region.

It analyzes the future of the area in terms of three possible scenarios, called Coal Development Profiles, each reflecting a different rate of energy development in the area. The middle scenario, based on projections made by the Department of the Interior in 1972, envisions by the year 2000 the establishment of 24 export coal mines, 25 electric power plants with a capacity of 20,000 megawatts, and 16 synthetic natural gas plants.¹⁹ Total coal production will be 362 million tons, which is over half of total present production in the entire country.²⁰ The consumption of water, a crucial consideration in this semi-arid to arid area, ranges from a low use estimate of 139,000 acre feet/per year to a high use estimate of 843,000 acre feet for the moderate projection.²¹ The conservatism of these estimates is shown by the fact that, as of August 1975, the Bureau of Mines already listed 34 specific mines and 20 specific coal conversion plants proposed to be established by 1980.²² In addition, as of October 1974,

¹⁸ Answers of the Secretary to Questions Submitted by the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee in connection with the hearing held February 16, 1976, Answer #77 (hereafter Answers of the Secretary).

¹⁹ NGPR Program Report, p. 40.

²⁰ *Ibid*; Coal Programmatic EIS, p. 1-25.

²¹ NGPR Program Report, p. 41.

²² Subcommittee to Expedite Energy Development, U.S. Bureau of Mines, "A Listing of 43 Proposed, Planned or Under Construction Energy Projects In Federal Region VIII (August 1975) (hereafter "Bureau of Mines Listing").

there were already industrial water options in effect for over 700,000 acre feet, and option applications for 2,529,000 acre feet per year.²³

Thus it seems more likely that the estimates made in the high scenario are more realistic although even they may be too low.²⁴ This scenario envisions by 2000 the establishment of 64 export mines, 25 power plants with a capacity of 20,000 megawatts and 41 synthetic natural gas plants.²⁵ The range of water consumption is 343,000 acre feet to 1,593,000 acre feet per year.²⁶

Other related developments are also expected in the Northern Great Plains. In order to provide the necessary quantities of water in this semi-arid region, the federal petitioners have proposed construction of a system of aqueducts, pumping plants, reservoirs and dams to divert water and convey it to the coal fields and power plants.²⁷ The electrical power generated by the power plants will be transmitted to major population centers over ultra-high voltage transmission lines.²⁸ Railroads, highways, water and slurry pipelines²⁹ will also be built to transport the coal and serve the additional population.³⁰

²³ NGPR Program Report, p. 71.

²⁴ See, e.g., *id.* at 44, estimating expected coal production at just under the high scenario figure.

²⁵ *Id.* at 40.

²⁶ *Id.* at 41.

²⁷ *Id.* "Foreword"; Bureau of Reclamation, Appraisal Report on Montana Wyoming Aqueducts (1972) (hereafter Aqueduct Report).

²⁸ North Central Power Study, Phase I (1972), p. 19.

²⁹ The Bureau of Mines anticipates that approximately 1836 miles of slurry pipelines will be completed between 1975 and 1982. Bureau of Mines Listing, *supra*.

³⁰ Montana Coal Task Force, Situation Report on Coal Development in Eastern Montana (1973), p. 65; Aqueduct Report, pp. 27-28.

Estimates of the population increase in the region range from more than 245,000 new residents for the entire region (for the middle scenario of the NGPR Program)³¹ to 300,000 to 400,000 in eastern Montana alone.³² The lower estimates will mean an increase of over 30 percent in the next decade in contrast to the population growth of 1% during the decade of the 60s.³³ For the State of Wyoming alone, the State has estimated that population in the northeastern portion of the State, where the coal development is occurring, will expand from 56,100 in 1970 to 143,755 in 1990, a growth of 156 percent by contrast with a past average annual growth from 1950 to 1970 of slightly more than 1 percent.³⁴ The same study shows that in Campbell County, where many federal coal leases are located, the population will increase from 12,957 in 1970 to 56,969 in 1990, an increase of more than 400 percent in just twenty years.³⁵ The huge population increases will make it necessary to build new housing and expand the region's health, education, communication, recreation, sanitation, cultural, commercial, fire and law enforcement facilities.³⁶ The net result will be to change the region from an agrarian to an urban-industrial economy. The coal development of the Northern Great Plains region may well be the most massive industrial development of a rural area within a short period of time which has ever occurred in this country.

³¹ NGPR Program Report, pp. 40, 120.

³² Montana Environmental Quality Council, First Annual Report (1972), p. 145 (hereafter Montana Environmental Council Report).

³³ NGPR Program Report, p. 120.

³⁴ Powder River Basin Report, p. 12 and Figure 4.

³⁵ *Id.*, Figure 5.

³⁶ *Id.* at 10; Montana Environmental Council Report, p. 145; Aqueduct Report, p. 26; NGPR Program Report, p. 129.

Environmental Impacts. The environmental impact of this vast coal development will be correspondingly enormous. The projected development of the region's coal resources will permanently destroy much of the region's environment by converting it into a major industrial complex. The large strip mines, mine-mouth electric and coal gasification plants, railroads, aqueducts, transmission lines and other installations related to this coal development will cause an enormous, adverse impact on land use, water supply, water and air quality, wildlife, aesthetics and other elements of the environment.

For example, it has been variously estimated that the land to be stripmined for this coal development will cover from 30 square miles per year—or a total of more than 1,000 square miles during the development's projected 35-year duration—to more than 3,000 square miles in northeastern Wyoming alone.³⁷ Federal and state studies show that no strip-mined land has yet been fully reclaimed and that the region's climate, low precipitation and thin topsoil make it extremely likely that much of it will not be successfully reclaimed.³⁸ A federal inter-agency task force has stated that "acceptable reclamation of these semi-arid lands has yet to be demonstrated."³⁹ The Bureau of Land Management has recognized the adverse

³⁷ Malde, U.S. Geological Survey, Denver, Colorado, Letter to Director, U.S. Geological Survey, April 24, 1972, pp. 2-3; Bureau of Land Management, Powder River Basin Report, p. 9.

³⁸ Montana Coal Task Force, Coal Development in Eastern Montana, p. 33 (1973) (hereafter Montana Coal Task Force Report); Montana Environmental Council Report, p. 143 (1972).

³⁹ Sulfur Oxide Control Technology Assessment Panel, Final Report on Projected Utilization of Stack Gas Cleaning Systems by Steam-Electric Plants, p. 69 (April 1973).

environmental impacts of this coal development in the Powder River basin in Wyoming:⁴⁰

About 21 billion tons [of coal] are strippable with 16 billion tons being on the east side of the basin in what is known as the Wyodak zone. This Wyodak zone outcrops and extends south for approximately 90 miles from a point about 20 miles north of Gillette which if developed for coal can result in a total disturbance in excess of 200,000 acres.

This procedure of [strip] mining will totally disrupt the existing ecosystem. Rehabilitation of this type of practice will not approach restoration.

The resultant boom with its enormous population pressures may cause more human resource problems than the ecological damage of strip mining itself.

C. Adverse Impacts That Cannot Be Avoided:

The Overall Impact: The total impact of enabling the proposed railroad line for coal development will transform large areas of the Powder River Basin into an abnormal, imbalanced ecosystem. Both plant and animal species, in disturbed areas will be either eradicated completely, displaced, or temporarily eliminated. Air and water quality will be lowered by material carried in suspension. The visual and noise pollution will continue until the energy resources are depleted. It is doubtful that the human impact as mentioned under impacts can be completely mitigated.

⁴⁰ Bureau of Land Management, Burlington-Northern Inc. Environmental Analysis Record: Proposed Railroad, Douglas to Gillette Wyoming (August 1973), pp. 2, 5, 7-8 (hereafter Burlington-Northern Environmental Analysis).

Another report of the Bureau of Land Management has found: ⁴¹

Mining activities may, particularly in the breaks areas, trigger large scale movements of fragile soils. The thin productive soil mantle which maintains the vegetative cover in many areas will be degraded. Removal of natural vegetative cover in strip mine operations may be irreversible. The most sophisticated reclamation procedures could not replace the natural soil structure nor would reseeding come close to duplicating the natural ecological composition.

In addition, a study of the Department of Agriculture has stated even more emphatically: ⁴²

The impacts of strip mining on the soil of this area by current mining methods would be complete destruction.

Strip mining of these lands by the currently used mining methods and machinery would destroy seven of the existing ecosystems in the area. * * *

There is currently no technical nor projective evidence that rehabilitation of these ecosystems can be assured after strip mining * * *.

It is doubtful that the native grazing lands can be reestablished.

In March 1974, the Department of the Interior told Congress, in response to questions about the rehabilitation of lands which have been strip mined, that "we must admit we cannot fully restore total ecosystems with today's technology." ⁴³

⁴¹ Powder River Basin Report, p. 10.

⁴² Forest Service, Environmental Analysis Report, Request for a Competitive Coal Lease: Custer National Forest, pp. 49, 61, 68.

⁴³ Answers of Department of the Interior to Questions of the Subcommittee on Minerals, Materials, and Fuels of the Senate Commit-

The region's water supply will also be seriously affected. A study of the National Academy of Sciences has found: ⁴⁴

The potential environmental impact of water usage implied by the scale of surface mining operations combined with proposed energy conversion projects in the western region is staggering. * * * Such a diversion represents a significant fraction of the major river flow in the project region and could well result in very substantial environmental impacts over large areas of watershed.

More recently in 1974, Governor Judge of Montana stated that the industrial demands for water from the Yellowstone River relating to coal development already exceed the amount projected to be needed by the year 2000, that more requests are expected, and that this demand will leave no additional water available for agricultural uses. ⁴⁵

Ground water supplies will be seriously affected by the removal of coal formations which serve as the region's principal aquifers. ⁴⁶ The National Academy of Sciences has concluded that "surface mining activities may disrupt ground water flow patterns and interrupt traditional sources of water supply. These direct and indirect consequences may be far more important than the ability to rehabilitate the actual site of the mining and should guide decisions regarding regional development." ⁴⁷

tee on Interior and Insular Affairs, Hearings on Coal Leasing in Northern Great Plains, March 13, 1974, Answer to Question 14.

⁴⁴ National Academy of Sciences, Rehabilitation of Western Coal Lands (1973), pp. 22-23.

⁴⁵ Billings Gazette, March 23, 1974.

⁴⁶ Montana Environmental Council Report, pp. 143-144.

⁴⁷ National Academy of Sciences, pp. 22-23.

Water quality in the region will be degraded. Toxic mining spoils threaten to pollute ground water supplies.⁴⁸ Strip mining promotes erosion and increases the sedimentation of streams.⁴⁹ The Bureau of Land Management has concluded:⁵⁰

Watershed impacts of mining will have major effects on the basin's hydrologic system. The Powder River, the major drainage, can't under present conditions flush its sediments.

Similarly, once the proposed coal-burning power plants begin operation at their enormous generating capacity, the region's air quality—now almost pure and containing little industrial pollution—will be seriously degraded.⁵¹

There will be other major environmental impacts as well. The Bureau of Land Management has found that serious damage to wildlife will occur:⁵²

The modification of wildlife habitat resulting from concentrated development and human activity will affect virtually all wildlife species to a certain degree. For some the effects could be serious.

Another Bureau of Land Management report notes that "[b]oth plant and animal species, in disturbed areas will be either eradicated completely, displaced, or temporarily eliminated" and that "visual and noise pollution" will result.⁵³

⁴⁸ NGPR Program Report, pp. 91-92; Montana Environmental Council Report, p. 144.

⁴⁹ NGPR Program Report, p. 91; Montana Coal Task Force Report, p. 51.

⁵⁰ Powder River Basin Report, p. 10.

⁵¹ See, e.g., Final Environmental Impact Statement, Eastern Powder River Basin, p. I-647a.

⁵² Powder River Basin Report, p. 10.

⁵³ Burlington-Northern Environmental Analysis, p. 7.

The increase in population will have enormous environmental effects. The Bureau of Land Management has found as to this impact in the Powder River Basin:⁵⁴

Major ecological, economic and social systems will be definitely affected by the scale of anticipated development in the basin. Most all present uses, resources, municipalities, and even the general way of life will be forced to change.

* * * *

The traditional life style of many ranchers will be violently disrupted. Most land-owners may be compelled to sell. It is unlikely that these original operators will resume the livestock operations after mining has taken place. There is a great danger in temporarily changing an agricultural economy to a boom type of economy based on mining. The result may be an inability to recover and return to a successful agricultural base.

The Bureau has further confirmed the seriousness of this impact:⁵⁵

The resultant boom with its enormous population pressures may cause more human resource problems than the ecological damage of strip mining itself.

A Montana state study has found:⁵⁶

The increased tax base is often temporary in the case of coal mining and coal-related industry. Unless reclamation is unusually successful and the land is restored to a productive condition, strip mining destroys the base: when the coal is depleted and the power companies move their plants closer to new fuel supplies, spoilbanks have little tax value. The present standard of living in the Appalachian coal

⁵⁴ Powder River Basin Report, p. 10.

⁵⁵ Burlington-Northern Environmental Analysis, pp. 7-8.

⁵⁶ Montana Coal Task Force Report, p. 19.

fields demonstrates the long-range economic impact of indiscriminate mining. The coal and power companies have departed, leaving the people with no jobs and the government with nothing to tax. With exhaustion of Montana's coal reserves, a similar situation would almost certainly develop: The lifetime of proposed generating facilities for Montana coal development is estimated to be about 30 years.

The Bureau of Land Management has said that "boom town" development in the region has already become apparent:⁸⁷

A local social psychologist calls this the "Gillette syndrome" after a local boom town. This is a social system of higher rewards and greater pains that accompany an industrial boom. It includes the three A's: alcohol, accidents and absenteeism, as well as the three D's: divorce, delinquency and depression. These results become social costs and are very significant in both terms of human misery and dollars. For example, Gillette, Wyoming with 8,000 people during a four year boom period averaged one suicide per week; this is 10 times the national average. This town also has one of the highest delinquency rates, high school dropout rates and divorce rates in the Nation.

The Northern Central Power Study was initiated in 1970 by the Department of the Interior in order to:⁸⁸

investigate the potential of electric power in the north central United States. The geographic scope of the study included all or portions of twelve states and minor portions of three other states.

This study was terminated in 1972 after publication of a Report on Phase I of the study.⁸⁹ The Department of

⁸⁷ Powder River Basin Report, p. 11.

⁸⁸ Affidavit of Secretary Kleppe, App. 190.

⁸⁹ North Central Power Study, Report of Phase I, Volume I.

the Interior also suspended in 1972 a study it had undertaken to examine "the availability of water resources in southeastern Montana and northeastern Wyoming for the development of the vast coal resources in the region."⁹⁰

The district court found that the North Central Power Study was evidence of efforts by the Department of the Interior "to investigate the potential for coordinated development of electric power supply in the north central United States."⁹¹ The district court found that the Montana-Wyoming Aqueducts Study was evidence of efforts by "the Department of the Interior to control development of coal on a national basis, including the Northern Great Plains."⁹²

In June 1972 then Secretary Morton initiated a study of the Northern Great Plains region, pointing out that:⁹³

The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environmental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

The resulting Northern Great Plains Resources Program, which was jointly undertaken by the Departments of the Interior and Agriculture, the Environmental Protection Agency and the State governments, studied a geographic

⁹⁰ Aqueduct Report, Foreword.

⁹¹ Fed. Pet. App. 89A.

⁹² Fed. Pet. App. 90A.

⁹³ Memorandum of Secretary Morton, June 30, App. 130.

area of 63 counties in eastern Montana and Wyoming and western North and South Dakota. After a report was issued in August 1975 the program was terminated in January 1976.⁶⁴ Neither that Program nor any federal agency has prepared an environmental impact statement for the region as a whole.

An environmental impact statement has been prepared on the Eastern Powder River Coal Basin, which covers the approval of four mining plans and the proposed railroad line between Gillette and Douglas, Wyoming.⁶⁵ This statement also purports to analyze on a comprehensive basis a small portion of the Northern Great Plains, namely the Eastern Powder River Coal Basin in northeastern Wyoming. This basin is a part of the coal development area in northeastern Wyoming described in the complaint and studied by the Northern Great Plains Resources Program.

Moreover, even though federal agencies have taken numerous actions regarding coal development in the Northern Great Plains since the effective date of the National Environmental Policy Act (January 1, 1970), few environmental impact statements have been prepared on these individual actions. No environmental impact statement has been issued on any of the coal leases awarded since 1970.⁶⁶ Similarly, no environmental state-

⁶⁴ Secretary Kleppe, Letter of January 29, 1976, to Senator Metcalf, attached to the Secretary's Response to Questions of the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee.

⁶⁵ This statement has been lodged with the Clerk of this Court by the federal petitioners.

⁶⁶ The Court of Appeals for the Ninth Circuit has ruled that the failure to prepare an environmental impact statement for a large federal coal lease in the Northern Great Plains which was approved after January 1, 1970, violated NEPA. *Cady v. Morton*, 527 F.2d 786 (C.A. 9, 1975). It is respondents' understanding that a statement is now in preparation on the leases involved in that case.

ment has been prepared as to any of the water option contracts, despite the great importance of water supply in the area. No environmental statement has been prepared on any of the coal prospecting permits, in spite of the Department of the Interior's position that such permits must lead to the award of a lease so long as "commercial quantities" of coal are found. The only environmental impact statements have been prepared for mining plans for seven mines as to which the leases had already been awarded and for authorization of the railroad line between Gillette and Douglas, Wyoming.

In addition, two draft environmental impact statements have recently been issued. One involves a mining plan for the Cordero coal mine in the Eastern Powder River Basin of Wyoming and the second involves a proposed reservoir on the Middle Fork of the Powder River also in Wyoming.⁶⁷ The reservoir waters are partly intended for agricultural use, but much or most of the water is expected to be used for coal gasification or another industrial use, such as coal liquefaction, coal fired steam electric generation, or slurry pipeline.⁶⁸

⁶⁷ U.S. Geological Survey, Draft Environmental Statement for the Proposed Plan of Mining and Reclamation, Cordero Mine, Sun Oil Company, Coal Lease 8385, Campbell County, Wyoming, DES 75-65 (December 1975); Bureau of Land Management, Draft Environmental Impact Statement for the Proposed Reservoir on the Middle Fork of Powder River, DES 76-5 (January 1976).

⁶⁸ The Department of the Interior has also prepared an environmental impact statement for the Federal Coal Leasing Program (often referred to as the Coal Programmatic), which considers federal coal leasing policy for the entire country. However, no federal actions other than coal leasing are considered. The Secretary of the Interior has recently described the Coal Programmatic (Department of the Interior News Release, AEP Br. App. 6a): "This statement is intended to be a general analysis of the environmental impacts of major leasing alternatives. It will not, however, satisfy the requirement for future site-specific or regional environmental analyses as individual coal-related actions are proposed."

SUMMARY OF ARGUMENT

I. Although the position of the Department of the Interior in this litigation superficially appears not to have changed since initiation of the suit, in fact the Department has now adopted the policy urged by respondents of preparing regional environmental impact statements to analyze related federal activities taking place in the same geographical area. This policy is currently being implemented as part of the new coal leasing policy announced by the Department of the Interior on January 26, 1976.

The Department has specifically applied this policy to the coal development in the Northern Great Plains. It has prepared one environmental statement of the type it now proposes to undertake, the Eastern Powder River Coal Basin Impact Statement principally covering one and one-half counties in Wyoming. The Department plans to do four additional environmental statements on subportions of the Northern Great Plains region.

The Department's adoption of regional environmental statements as the means for satisfying the requirements of NEPA for full, comprehensive analysis of the environmental impacts of major federal actions apparently stems from the Department's realization, voiced recently by the Secretary of the Interior, that "mining coal from one or more leases might have substantial broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands." Testimony of the Secretary before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee, February 16, 1976 (App. A, p. 3a below). In the course of that same hearing, the Secretary and the Solicitor of the Department of the Interior admitted that the only dispute remaining be-

tween the Department and the respondents herein concerned the size of the region which should be considered.

II. The decision of the Department of the Interior to prepare comprehensive regional environmental statements is consistent with the requirements of the National Environmental Policy Act, as expressed in the language of the statute, its legislative history, numerous judicial determinations, and the administrative practice of federal agencies.

A. If a regional environmental statement is required at all, it is clearly required at the present time. As this Court held in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975), NEPA requires issuance of an environmental impact statement only at the time a federal agency makes a proposal or, if it makes none, only when it makes its determination. Here, the Department of the Interior has already taken a large number of actions to lease large areas for coal mining, to option water, and to approve mining plans which will foster intensive coal and coal-related energy development in the Northern Great Plains region. The approval of four mining plans occurred as recently as February 1976.

Unlike the situation presented to this Court in *SCRAP*, the federal activity triggering the NEPA process and requiring adequate analysis has gone far beyond the initial proposal stage. The award of federal leases for coal is a virtually irrevocable act, committing that resource and setting in motion all of the environmental, economic and social impacts which coal development will have. It is clear that a regional environmental statement must be prepared before or at least at the time of further federal actions.

B. The present position of the Department of the Interior concerning the scope of an environmental impact statement is consistent with the requirement of the National Environmental Policy Act that federal actions

which are related and have cumulative effects far beyond the impact of a single project must be the subject of an appropriate environmental analysis. Section 102(2)(C) and (D) of NEPA require that specific subjects be analyzed in detail in environmental impact statements. When federal agencies take numerous related actions, these subjects can be adequately analyzed only if a comprehensive environmental impact statement is prepared.

Numerous federal decisions interpreting NEPA require that related federal actions should be considered in a comprehensive environmental impact statement. These decisions are consistent with this Court's determination in *SCRAP* that the scope and content of an environmental statement depend on the kind of federal action involved. Here, the numerous related federal decisions, which are final in every respect and will have enormous environmental effects, require preparation of a comprehensive environmental statement.

The preparation of comprehensive impact statements accords with the policies and practices of virtually all federal agencies. The Council on Environmental Quality has issued guidelines which require comprehensive statements when federal actions are geographically, environmentally or programmatically related. 40 C.F.R. 1500.6. Numerous agencies have included the preparation of comprehensive statements in their formal regulations and customary practice. They have recognized the value of such comprehensive analysis and consideration to the carrying out of NEPA.

C. The actions being taken by the federal petitioners concerning coal development in the Northern Great Plains are the kinds of related actions requiring a comprehensive environmental statement. The actions are geographically related because they all involve the Fort Union and Powder River coal formation.

The use of water, air and water pollution, population increases and other cumulative effects of the individual projects make them clearly related environmentally. For example, commitments of water for one project will have an inevitable effect not only on the available water supply for agriculture, wildlife, and recreation but also on the feasibility of other projects which will need the same water. Air pollution produced by one facility will mingle with that from many others.

The various federal actions are also programmatically related. The Department of the Interior has recognized this in several studies, culminating in the Northern Great Plains Resources Program. This program was developed because the Department of the Interior specifically recognized the need to coordinate and control development in the region.

It is impossible to carry out the specific requirements of Section 102(2)(C) to analyze the effects and alternatives of federal actions except on a comprehensive, regional basis. The cumulative effects of all the projects must be analyzed concerning water usage, air and water pollution and many other important elements of the environment. Such basic alternatives as whether western coal is economically and environmentally preferable to eastern coal when shipped to eastern markets, whether strip mining should be concentrated in that portion of the region where reclamation is most likely, and whether railroad transportation is preferable to slurry pipelines can only be analyzed on a regional basis.

Those agencies charged by the Congress and the Executive with primary responsibility for overseeing the proper function of the National Environmental Policy Act and of furthering its goals, the Council on Environmental Quality and the Environmental Protection Agency, have specifically concluded that NEPA requires the Department of the Interior to prepare a comprehensive re-

gional environmental statement on coal development in the Northern Great Plains. This interpretation of the Act, by agencies charged with the responsibility of enforcing it, is of course entitled to great weight.

III. The appropriate region for a regional environmental impact statement concerning coal development in the Northern Great Plains is northeastern Wyoming, eastern Montana, and the western Dakotas. This area was not defined by respondents; instead, it is the precise area of the Fort Union and Powder River coal formations. Consequently, the Department of the Interior itself has repeatedly recognized this region as the appropriate one for comprehensive environmental analysis. The Northern Great Plains Resources Program, the federal government's major study of the region encompassed the same area. Moreover, any subregional analysis prevents consideration of the cumulative impact of development as to water supply, air and water pollution, and increased population. The Department of the Interior's belated decision to divide the Northern Great Plains into regions is therefore inconsistent with its duties to carry out adequate environmental analysis under NEPA and is invalid.

IV. Even if the Department of the Interior's decision to do environmental statements on subregions of the Northern Great Plains complies with NEPA, further federal action may not be taken without preparation of adequate subregional statements. Since subregional statements have not been prepared outside of the Eastern Powder River basin, major federal actions concerning coal development cannot be taken in those areas until a subregional statement is completed. The Secretary of the Interior has explicitly recognized this principle.

In addition, the Powder River environmental statement is clearly inadequate as a subregional statement because of its complete or almost complete failure to discuss the basic alternatives involved in coal develop-

ment. However, since the adequacy of the statement has not been litigated in this case, it is plainly not appropriate for determination by this Court. Consequently, either this issue should be remanded to the district court or respondents should be left free to raise it in separate litigation.

ARGUMENT

The petitions for writ of certiorari in these cases presented the question whether the National Environmental Policy Act required preparation of a regional environmental impact statement relating to coal development in the Northern Great Plains. That issue is of extremely great importance to the administration of NEPA. It involves whether the Act requires federal agencies to prepare comprehensive environmental statements on a programmatic or regional basis if a number of their actions are related.

We submit, however, that that important question is no longer fairly before this Court. While the brief of the federal petitioners (as well that of the industry petitioners) is still devoted to this question, the Department of the Interior has adopted a policy, pursuant to the National Environmental Policy Act, of preparing regional environmental impact statements whenever it is taking a number of actions in the same geographical area. Moreover, it has specifically applied this policy to the coal development in the Northern Great Plains region.

In short, the Department of the Interior has adopted the position of respondents in this litigation. The only remaining controversy appears to be that the Department of the Interior has determined that the appropriate scope for the regional statements which are prepared is subsections of the Northern Great Plains region. We therefore believe that the correctness of this determination is the only issue now before this Court.

We will show below that the Department of the Interior has adopted the position advanced by respondents in this litigation that regional environmental statements must be prepared, pursuant to the National Environmental Policy Act, before a federal agency takes a number of related actions in the same geographical area and has specifically applied this policy to the coal development in the Northern Great Plains region. We will further show that the Department of the Interior properly construed the National Environmental Policy Act and this Court's decision in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975) (hereafter SCRAP II), in deciding both that a regional environmental statement was required and in determining that the time was already ripe for preparation of such a statement concerning coal development in the Northern Great Plains.

We will then discuss the only present disagreement between the Department of the Interior and respondents—the scope of the area which should be considered in a regional statement. The Department of the Interior claims that five subsections of the Northern Great Plains are the appropriate areas for analysis in regional environmental statements. Respondents contend that the entire Fort Union and Powder River coal formations in northeastern Wyoming, eastern Montana, and the western Dakotas should be considered. Indeed, we will show that the Department of the Interior has itself always considered this the appropriate region for environmental analysis.

I.

THE DEPARTMENT OF THE INTERIOR HAS ADOPTED A POLICY OF PREPARING REGIONAL ENVIRONMENTAL IMPACT STATEMENTS WHEN SEVERAL FEDERAL ACTIONS ARE BEING CONSIDERED INVOLVING THE SAME GEOGRAPHIC REGION AND HAS APPLIED THIS POLICY TO COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS

The Department of the Interior has been gradually moving towards a policy which is in agreement with that of respondents in this litigation—that regional environmental impact statements should be prepared concerning related federal proposals involving the same geographical area. In testimony before the Subcommittee on Fisheries and Wildlife, Conservation and the Environment of the House Committee on Merchant Marine and Fisheries in September 1975, George L. Turcott, Associate Director of the Bureau of Land Management of the Department of the Interior, described the progress of the Department's adoption of regional analyses (National Environmental Policy Act Oversight, No. 94-14, 94th Cong., 1st Sess. 29, 30):

Based on the court decisions and on the comments that we have received on both individual and program type EIS's, we have been considering the development of geographic area EIS's, starting with the geographic EIS now being prepared for BLM's livestock grazing program.

Geographical area or regional EIS is one alternative to solving the problem of cumulative impacts assessments, and it would also cover current specific proposals.

* * * *

A brief statement about western energy development will highlight the complexity and multiplicity of

problems and issues we must address, and illustrate the possible use of regional program EIS's.

There are many existing and proposed energy related projects in the three-State area of Montana, North Dakota, and South Dakota. These include coal mining, coal gasification, powerplants, water developments, transportation systems, pipelines, and transmission lines.

These projects, to the extent Federal actions are involved, must meet NEPA requirements for environmental assessment and EIS's.

* * *

The projects and related facilities require action by BLM, the Bureau of Reclamation, U.S. Geological Survey, the Bureau of Indian Affairs, the Fish and Wildlife Service, and others in Interior.

In addition, there will be interagency involvement with at least the U.S. Forest Service, the Environmental Protection Agency, the Federal Energy Administration and the Corps of Engineers. There may be more.

All this requires a carefully worked out strategy for preparing EIS's.

* * *

We have authorized what we might call a geographic statement for all of northwest Colorado, involving several ongoing coal mines, in part on private land, and in part on public lands.

There are many new coal applications, with mammoth proposals for four-lane highways to serve this area, new towns, transmission lines, oil and gas pipelines. It is a very large complex.

Another official of BLM, Robert Jones, Chief of the Environmental and Planning Division, then described the BLM involvement in the Dakotas and Montana, pointing out that about 80 percent of the mineral resources in

North Dakota are under federal jurisdiction, and noting that 5 major energy complexes were being planned or were in various stages of development there. As he explained (*id.* at 31):

This is the region you see here. These projects are interrelated. One project in the area might have acceptable environmental consequences, but, if you have border-to-border projects all the way across you have a substantially different environmental situation.

Subsequently, Secretary of the Interior Kleppe filed an affidavit in this Court stating (App. 194):

* * * the Department has determined that, whenever possible, several proposals for federal actions in the same region will be covered by a single environmental impact statement rather than by multiple statements.

On January 26, 1976, the Secretary announced his decision to end the moratorium on federal coal leasing. In doing so, he adopted a number of new policies which are contained in the Executive Summary and Decision Document.⁹⁹ He decided with regard to environmental impact statements (*id.* at 18-1; App .B, pp. 20a-21a below):

Where an EIS is required under NEPA for a particular Departmental action, whether that EIS will be a regional EIS or a site-specific EIS, will be determined according to the following principles:

A. As a general proposition, and as determined by the Secretary, when action is proposed involving coal development such as issuing several coal leases or approving mining plans in the same region, such actions will be covered by a single EIS rather than

⁹⁹ Both the Executive Summary and Decision Document and the Program Decision Option Document relating to the Federal Coal Program have been lodged with the Clerk of this Court. Relevant portions of the Executive Summary and Decision Document have been reproduced as Appendix B of this brief.

by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors.

B. In areas where the Secretary has determined that a regional EIS is to be prepared, if an individual action requires approval prior to completion of the regional EIS and, in the case of leasing activities, meets the short-term criteria, an environmental analysis will be completed. If the environmental analysis indicates that the individual action is such an integral part of the regional action that its environmental effects cannot be properly considered unless the regional EIS is completed, that action will be held until completion of the regional EIS.

C. In all other cases, each coal lease or mining plan will be analyzed and an environmental analysis prepared to determine whether or not an EIS is required. If the environmental analysis indicates an EIS is necessary to comply with NEPA, a site-specific EIS, or a *regional EIS, if a series of proposed actions with interrelated impacts are involved, will be prepared* unless a previous EIS has sufficiently analyzed the impacts of the proposed action(s). (emphasis added)

In the news release accompanying his January 26th statement on the new federal coal leasing policy, the Secretary declared that the policy would include, among other steps, "preparation of regional environmental impact statements, wherein groups of coal and coal-related actions are proposed in a defined geographical area * * *." Department of the Interior News Release, January 26, 1976 (See AEP Br. App. 6a).

The Secretary's policy to prepare regional environmental statements has been specifically applied to the Northern Great Plains. The Program Decision Option

Document of the Bureau of Land Management ranked in order of priority 30 areas for possible regional environmental statements. Program Decision Option Document, The Proposed Federal Coal Leasing Program, December 16, 1975, p. 38. Four of the first ten areas are in the Northern Great Plains region: the Eastern Powder River in northeastern Wyoming (which has been completed), most of the remainder of the coal area in northeastern Wyoming not covered by the Eastern Powder River environmental statement, southeastern Montana, and western North Dakota. A fifth area in eastern Montana is involved in a later statement. These regional statements will almost complete regional analysis of the Northern Great Plains. Moreover, the Bureau of Land Management has proposed to begin the regional statement for western North Dakota in April 1976. Preliminary Statement, Preparation Plan for an Environmental Impact Statement on Energy Development in Western North Dakota (March 15, 1976).

The decision to prepare regional statements was reaffirmed by the Secretary of the Interior during his appearance on February 16, 1976, before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee. In his prepared testimony, the Secretary stated (see App. A, p. 3a below):

In some cases, mining coal from one or more leases might have substantial broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands. In such instances, as determined by the Secretary, the Interior Department will prepare a regional environmental impact statement before deciding to proceed. The region covered will be determined by basin boundaries, drainage areas, economic interdependence, and other relevant factors.

As an example of the type of regional statement the Department would henceforth prepare, the Secretary cited the Eastern Powder River Coal Basin Environmental Impact Statement⁷⁰ and the statement under preparation for the area in northwest Colorado (App. A, p. 12a).

The Secretary's prepared testimony further set forth the Department of the Interior's position concerning the present litigation. The Secretary stated that the Department differed with respondents in only two respects. First, he said that there was a disagreement over the size of the area to be considered in the regional statement (App. A, p. 12a below):

The suit originally sought to enjoin further leasing actions and approval of coal mining plans within an area defined as the Northern Great Plains Region until such time as a Federal coal plan is devised for that region and an Environmental Impact Statement is prepared on that plan. As indicated earlier in this testimony, we intend, wherever necessary to complete regional Environmental Impact Statements, but of a different magnitude.

Then the Secretary described what he believed was the "real difference we have with the decision of the Circuit Court in the Sierra Club suit," erroneously claiming that the litigation involved the issue whether the Department of the Interior was required to prepare a regional plan for development (*ibid.*). While respondents believe that such a plan would indeed be extremely desirable and that regional planning probably is required by NEPA (see pp. 86-89 below), the complaint did not request the

⁷⁰ It had not previously in this litigation been claimed that the Eastern Powder River statement is a regional statement of the type petitioners have sought in this litigation. The court of appeals specifically found both that no such claim had been made and that that statement does not "comprehensive study the regional impact of coal development in the Northern Great Plains * * *" (Fed. Pet. App. A, pp. 10A-11A, note 15).

adoption of a regional plan as contrasted to regional analysis in an environmental statement and no such issue is before this Court.

In any event, it is clear that the Secretary did not claim that the Department of the Interior has any dispute with respondents' contention that a regional environmental statement is required as to coal development in the Northern Great Plains.

In the course of Secretary Kleppe's appearance before the Subcommittee, Senator Metcalf pressed the Secretary on the question of the cumulative impacts of the Department's activities in the Northern Great Plains (Transcript, Oversight Hearings on Federal Coal Leasing Program, Senate Interior Committee, February 16, 1976, p. 66):

[T]he cumulative impact of the activities of the Secretary of Interior in these coal leasing regions is the regulation of resources and is the regulation and the control of the whole economic impact of these areas and what they want you to do and what we want you to do is to have some overall planning and not just go bit by bit and one at a time on leasing programs, but to have administration of the Northern Great Plains, insofar as your leasing policy is going to affect the resources so that we know what your overall policy is going to be.

You can deny that you don't want to have any impact on the resources. But as a practical matter, with the vast amount of land that the Federal Government holds in the Western United States and the vast amount of coal land that is going to be mined, you're doing just exactly what you say you don't want to do
* * *

In response, the Secretary deferred to the Solicitor of the Department, who stated (*id.* at 67-68):

We have admitted that we think there ought to be regional planning, but as opposed to this Sierra Club

case, the Northern Great Plains case, we are not talking about a region that simply blankets a five state area. And that case did include Nebraska, Wyoming, North and South Dakota and Montana. But we are talking about regions that are defined more by drainage areas, basin boundaries and economic independence.

So the Government's position should not be taken as one which resists planning on a regional basis. It is simpl[y], we feel, that a region should be defined because of the actual circumstances and conditions and not simply taking a large area of the United States without regard to the actual facts.

In sharp contrast to the position taken in the federal government's brief before this Court—that a single statement is required only “when a number of related projects logically form a single plan or proposal” (Fed. Br. 31, note 24)—the Department of the Interior plainly has concluded that a regional statement is required when the series of proposed actions has “interrelated impacts” (Executive Summary and Decision Document, *supra*; Appendix B, p. 21a below). Moreover, it has determined on this basis to do regional statements concerning coal development in the Northern Great Plains. We therefore submit that no controversy now exists between respondents and the Department of the Interior concerning the basic issue whether regional environmental statements must be done prior to federal actions concerning coal development in the Northern Great Plains.

II.

THE DETERMINATION OF THE DEPARTMENT OF THE INTERIOR TO PREPARE REGIONAL ENVIRONMENTAL IMPACT STATEMENTS IS CONSISTENT WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND THIS COURT'S DECISION IN SCRAP II

The petitioners challenge the decision of the court of appeals on two major grounds. First, petitioners argue that the time at which an environmental impact statement must be prepared is determined by the time when the government formally proposes action. Until there is an express federal “proposal,” the petitioners claim there is no need for an environmental statement. Fed. Br. 24, 39-42; AEP Br. 25-28, 30-33. Second, federal petitioners argue that because the Department of the Interior has not “proposed a separate ‘regional’ plan,” the only federal action is “either national or local in character” and no regional analysis is necessary. Fed. Br. 22, 23, 29-35. See also AEP Br. 33-35. This argument, which is also based on the alleged need for a “proposal,” in fact goes to the question of the proper scope, rather than timing, of the environmental statement. For both of these propositions, petitioners rely in large measure on this Court's recent decision in SCRAP II.

As we have seen above, the Department of the Interior has resolved both of these issues. It has determined that regional environmental impact statements should be prepared on coal development in the Northern Great Plains and that the time for the preparation of these statements is prior to further federal action. We submit that these decisions are consistent with the National Environmental Policy Act and SCRAP II.

A. THE TIME IS RIPE FOR THE PREPARATION OF A REGIONAL ENVIRONMENTAL IMPACT STATEMENT

Petitioners contend that the National Environmental Policy Act does not require the preparation of a regional environmental impact statement until federal proposals for regional development have been made. Fed. Br. 24, 39-42; AEP Br. 25-28, 30-33. In doing so, they rely heavily on this Court's opinion in SCRAP II. We submit, on the contrary, that the only substantial issue in this case relates to the scope, rather than the timing, of the environmental impact statement.

There can be no serious question as to the timing of a regional statement in this case. The federal petitioners are not merely preparing actions in the future but have already taken numerous actions, including in the last few months, concerning coal development in the Northern Great Plains. The only question is therefore whether the federal agencies can continue to take actions without preparation of a regional environmental statement. The resolution of that issue depends upon whether the scope of the environmental analysis for particular federal actions can be confined to particular projects or must be done on a regional basis. As we will show below, it is clear that a regional environmental statement must be prepared which considers the cumulative effects of, and reasonable alternatives to, related actions in the same geographical area.

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), states that the time for the preparation of environmental impact statements is when federal agencies make a "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." That Section further provides that the environmental statement "shall accompany the

proposal through the existing agency review processes." Thus, the language of NEPA is perfectly clear that environmental statements must be prepared at the time proposals are made by federal agencies and certainly by the time federal actions are taken.

This Court's holding in SCRAP II is fully consistent with this analysis. The Court found that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action" (emphasis in original). 422 U.S. at 320. The Court then said that, "where an agency initiates federal action by publishing a proposal * * *, the statute would appear to require an impact statement to be included in the proposal * * *." *Ibid.* However, the Court found that in the ICC proceeding involved in SCRAP II, the environmental impact statement did not have to be prepared until the ICC made its decision (*ibid.*):

[T]he ICC has made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1974 * * *. (emphasis in original)

The decision of the court of appeals in this case is fully consistent with the language of NEPA and this Court's decision in SCRAP II. The court of appeals did not hold that an environmental impact statement must be prepared for some uncertain future federal decision or action. On the contrary, the court of appeals specifically stated (Fed. Pet. App. A, p. 42A):

We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus, we think it

proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe.

The court of appeals then stated: "Preparation of a statement must precede, *or at least accompany*, preparation of the recommendation or report on the proposal * * *" (emphasis added). *Ibid.*

Here, at the time that the court of appeals issued its opinion, federal agencies had already made numerous decisions concerning coal development in the Northern Great Plains. As we have seen above (pp. 11-12), the Department of the Interior, subsequent to the effective date of NEPA, had already issued 29 coal mining leases covering 137,802 acres, granted 97 coal prospecting permits covering 685,280 acres which confer the right to obtain leases, entered into water option contracts involving 601,000 acre-feet of water per year, and approved four mining plans. Hundreds of other applications were pending. Nevertheless, the court of appeals did not order that a regional environmental statement must be prepared because the federal government "has largely suspended activity" in the Northern Great Plains and "irretrievable commitments are largely being avoided." Fed. Pet. App. A, p. 46A. The court remanded the case to allow the federal petitioners and subsequently the district court to consider whether the federal agencies were proceeding further with development so that a regional environmental statement would have to be prepared before further actions were taken. *Id.* at 49A.⁷¹

⁷¹ Both the federal and industry petitioners repeatedly state that the court of appeals held that an environmental statement was necessary if the Department of Interior was merely contemplating action. Fed. Br. 31-35; AEP Br. 24-25. The use by the court of appeals of the word "contemplating" in describing federal petitioners' conduct was appropriate at the time of the decision, when the moratorium on leasing imposed by Secretary Morton in 1973

Since the court of appeals' decision, the federal petitioners have answered by their actions the questions remanded by the court of appeals. The Secretary of the Interior has approved five mining plans—one on November 11, 1975, and four more, after this Court stayed the injunction issued by the court of appeals in February, 1976.

The Secretary of the Interior has further made clear that he intends to proceed with federal actions in the Northern Great Plains. He has ended the moratorium on federal coal leasing, including in the Northern Great Plains. In announcing the new coal leasing policy, he has pointed out that "[i]t is obvious that these Federal coal deposits must be developed." Department of the Interior News Release. AEP Br. App. 3a. He has stated that existing preference right lease applications "must be acted upon." App. B, p. 9a below.⁷² Ac-

was still in effect and the Department of the Interior did not appear on the verge of further action.

However, the court of appeals specifically held the very opposite of what the petitioners claim. It stated: "Our conclusion that major federal action is contemplated in the Northern Great Plains does not mean, ipso facto, that a comprehensive regional impact statement is required." Fed. Pet. App. A, p. 42a. It therefore remanded the case, even though it found that action was contemplated, to the district court to determine whether the time for preparation of the statement was ripe. It directed the district court, in deciding ripeness, to determine "[h]ow likely is the program to come to fruition and how soon will that occur." and "[t]o what extent are irretrievable commitments being made and options precluded." Fed. Pet. App. A, p. 43A.

We note that the Department of the Interior's own regulations provide that Section 102(2)(C) should "be construed with a view to the overall impact of the action proposed, *and of further actions contemplated*" (emphasis added). Manual Part 516, Ch. 2, Section .5.B, 36 Fed. Reg. 19344. CEQ's Guidelines likewise state that contemplated actions should be considered. 40 C.F.R. 1500.6(a); 38 Fed. Reg. 20551.

⁷² There are presently 192 preference right lease applications, covering 9.3 billion tons of recoverable coal reserves, in 6 western

cording to the Program Decision Option Document, p. 1, the proposed leasing program includes "processing of noncompetitive coal lease applications * * *" and "offering new lease tracts * * *." The same document suggests a time framework for proceeding with the coal leasing program, calling for industry nominations of leasing areas 30 days after the decision on the program and the holding of lease sales eight months after the date of decision. *Id.* at 39. Draft environmental impact statements have recently been issued for a 6,500-acre strip mine in the Eastern Powder River Basin of Wyoming and for a reservoir in the same area which is intended to serve two projected coal conversion plants. The Bureau of Land Management has ranked four major coal areas of the region as among the first for which "regional" statements will be prepared, terming them "high priority areas." Program Decision Option Document, pp. 37-38.

In these circumstances, we submit that there is no substantial question on the timing of a regional environmental impact statement. As we will show below, a regional environmental statement must be prepared when federal agencies are taking numerous related actions in a particular geographic area. If this contention concerning the scope of environmental statements is correct, a regional environmental statement must plainly be prepared no later than the time when federal agencies issue a lease, approve a mining plan, or take other action.⁷³ Since the federal petitioners have already taken numerous such actions and are preparing to take numerous

⁷³ States. A large proportion of these applications are in the Northern Great Plains region. Department of the Interior News Release, February 23, 1976.

⁷⁴ Of course under the language of NEPA and this Court's decision in *SCRAP II*, if the federal agency makes a proposal prior to its decision, the environmental statement must be prepared at that time.

more, it is clear that a regional environmental impact, far from being premature, is considerably overdue. At the least, it must be prepared and considered before, or at the time, further federal actions are taken.

One of the reasons NEPA was adopted was to avoid step-by-step commitments of resources without comprehensive analysis and consideration. As the Senate report stated (National Environmental Policy Act of 1969, S. Rep. No. 296, 91st Cong., 1st Sess. 5):

Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.

Today it is clear that we cannot continue on this course.

We submit that the comprehensive environmental impact statement on related federal actions is the principal mechanism to carry out the essential purpose of NEPA.

B. THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRES PREPARATION OF COMPREHENSIVE ENVIRONMENTAL IMPACT STATEMENTS WHEN FEDERAL AGENCIES ARE TAKING A NUMBER OF RELATED ACTIONS

As we have seen above, the basic issue in this case, prior to the decision of the Department of the Interior to prepare regional environmental statements concerning coal development in the Northern Great Plains, concerned whether NEPA required that the federal petitioners prepare a regional environmental statement. The first step in this analysis is whether NEPA requires comprehensive environmental statements in situations where a number of federal actions are so related that the environmental impacts and alternatives must be analyzed on a broader basis than a statement on a specific project. We

will show in this section that the Act's language, legislative history, federal court decisions, and administrative interpretation all strongly support the requirement that comprehensive statements are required by NEPA in particular situations. We will then show in the next section (pp. 73-101) that the coal development in the Northern Great Plains is, as the Department of the Interior has itself concluded, the kind of situation involving closely related federal actions where such a comprehensive environmental statement is required by NEPA.

1. The Language of the National Environmental Policy Act and Its Legislative History Show That Related Federal Actions Must Be Considered in a Comprehensive Environmental Impact Statement

In adopting the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, Congress recognized the historic failure of federal agencies to consider the effect of their decisions on the environment. Section 101(a) of NEPA, 42 U.S.C. 4331(a), states this recognition and declares a commitment on the part of the federal government "to use all practicable means and measures" to correct that failure and Section 101(b), 42 U.S.C. 4331(b), requires that the federal government "coordinate" federal activities to protect the environment. Section 102(2)(A), 42 U.S.C. 4332(2)(A), provides that federal agencies must "utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an effect on man's environment." Section 102(2)(G), 42 U.S.C. 4332(2)(G), requires that federal agencies "initiate and utilize ecological information in the planning and development of resource-oriented projects."

In order to implement the essential purposes of the Act, the Congress mandated in Section 102(2)(C), 42

U.S.C. 4332(2)(C), that federal actions "significantly affecting the quality of the human environment" be analyzed in a "detailed" environmental impact statement. The Act required that this environmental statement should analyze:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 102(2)(D), 42 U.S.C. 4332(2)(D), emphasizes the importance of the requirements relating to alternatives by requiring that federal agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

We submit that the requirements of Section 102(2)(C) and (D) cannot be met when related federal actions are involved without preparation of a comprehensive environmental impact statement. We particularly emphasize the requirements relating to environmental impact (Section 102(2)(C)(i)), to adverse environmental effects (Section 102(2)(C)(ii)) and to alternatives (Section 102(2)(C)(iii)(D)). When a number of federal actions are closely related, the environmental impact and effects of one of them cannot be analyzed without considering the impact and effects of other related actions. Simi-

larly, if a federal action is related to other actions, the alternatives cannot be fairly analyzed unless all the related actions are considered.⁷⁴ Consequently, as we will describe below, the lower federal courts and numerous federal agencies, including the Council on Environmental Quality, the Environmental Protection Agency, and the Department of the Interior itself, have agreed that comprehensive statements are necessary to analyze adequately related federal actions.

2. Numerous Federal Court Decisions Have Held That the National Environmental Policy Act Requires That Related Federal Actions Must Be Considered in a Comprehensive Environmental Impact Statement

The federal courts have repeatedly held that comprehensive environmental impact statements must be prepared, pursuant to NEPA, when federal agencies take several related actions. In *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 835 (C.A.D.C. 1972), the court stated as to a sale of oil and gas leases:

The scope of this project is far broader than that of other proposed Federal actions discussed in impact statements, such as a single canal or dam. The Executive's proposed solution to a national problem, or a set of inter-related problems, may call for each of several departments or agencies to take a specific action; this cannot mean that the only discussion of alternatives required in ensuing environmental-impact statements would be the discussion by each department of the particular actions it could take as an alternative to the proposal underlying its impact statement.

⁷⁴ We will show below (pp. 73-101), in particular, that a regional statement of coal development in the Northern Great Plains is essential in order to analyze the impact, effects, and alternatives concerning this development.

When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broader.

Judge Leventhal then went on to explain (*id.* at 836):

What NEPA infused into the decision-making process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, a *comprehensive approach to environmental management*, and a determination to face problems of pollution "while they are still of manageable proportions and while alternative solutions are still available" rather than *persist in environmental decision-making wherein "policy is established by default and inaction" and environmental decisions "continue to be made in small but steady increments" that perpetuate the mistakes of the past without being dealt with until "they reach crisis proportions."* S. Rep. No. 91-286, 91st Cong., 1st Sess. (1969), p. 5. (emphasis added)

The Court of Appeals for the First Circuit held in *Jones v. Lynn*, 477 F.2d 885, 891 (1973), that the preparation of environmental impact statements on individual buildings within an urban renewal project was not sufficient and that a comprehensive environmental impact statement was required:

[I]t would not seem sensible to adopt the piecemeal approach which HUD seeks to adopt, whereby it will prepare a modified impact statement separately for each proposed construction as a mortgage insurance application is filed, an approach akin to equating an appraisal of each tree to one of the forest.

. . . .

If the district court is to properly carry out the NEPA mandate, it must, if the planning reveals an expectation of substantial further federal assistance,

order HUD to conduct an environmental study of the entire Fenway program under 42 U.S.C. § 4332(2)(C) with the goal of determining what changes can still be made and, just as important, of informing the members of the community and the public what the environmental impact will be, what adverse effects cannot be avoided, and what irretrievable commitment of resources are involved when any plan is fulfilled.

Similarly, in *Greene County Planning Board v. FPC*, 455 F.2d 412, 420 (1971), certiorari denied, 409 U.S. 849, the Court of Appeals for the Second Circuit held that a "a single coherent and comprehensive environmental analysis" was required of an entire power project.⁷⁵

In *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079 (1973), the Court of Appeals for the District of Columbia Circuit considered the issue, relating to the Liquid Fast Breeder Reactor Program, whether the Atomic Energy Commission "must issue [an environmental impact] statement for the research and development program as a whole, rather than simply for individual facilities * * *." *Id.* at 1085. Relying on the interpretation of CEQ (see pp. 62-64 below), the court found that "[t]he Commission takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed quite the contrary is true." *Id.* at 1086-1087.⁷⁶

⁷⁵ This Court's disapproval of the *Greene County* decision in SCRAP II related to the question of the timing of the statement rather than its scope. 422 U.S. at 321, note 20.

⁷⁶ *Scientists' Institute* has been described by the Court of Appeals for the Ninth Circuit as a "leading case." *Friends of the Earth v. Coleman*, 513 F.2d 295, 299 (1975); *Cady v. Morton*, 527 F.2d 786, 795-796, note 9.

In *Chelsea Neighborhood Assn's v. U.S. Postal Service*, 516 F.2d 378 (1975), the Court of Appeals for the Second Circuit affirmed a lower court finding that an environmental impact statement was legally inadequate in failing to assess a likely future housing project to be undertaken by the City of New York and added to the facility planned by the Postal Service. The court pointed out (*id.* at 383):

It is correct that the Service will not build the housing portion of this project, but even so, the Service cannot ignore it. If the potential impact of the housing is not considered before the VMF [Vehicle Maintenance Facility] is constructed, it will be too late to reassess the project as a whole no matter what is shown by a later EIS for the housing prepared by another agency.

In *Cady v. Morton*, 527 F.2d 786 (C.A. 9, 1975), a case which the Council on Environmental Quality has described as "almost a companion case to the *Northern Great Plains* decision * * *" (Environmental Quality—1975, 6th Annual Report of the Council on Environmental Quality, p. 646), the court of appeals considered the question of the proper scope of an environmental impact statement. There, an environmental statement had been prepared on a mining plan covering some 770 acres of strip mining, but none had been prepared prior to the decision of the Department of the Interior to approve the basic leases which covered an area of more than 30,000 acres. The court distinguished a number of cases, including its own earlier decisions⁷⁷ which

⁷⁷ The court distinguished *Trout Unlimited v. Morton*, 509 F.2d 1276 (C.A. 9, 1974), *Environmental Defense Fund v. Armstrong*, 487 F.2d 814 (C.A. 9, 1973), *Friends of the Earth v. Coleman*, 518 F.2d 323 (C.A. 9, 1975), *Sierra Club v. Stamm*, 507 F.2d 788 (C.A. 10, 1974), *Sierra Club v. Callaway*, 499 F.2d (C.A. 5, 1974), and *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (C.A. 8, 1973). See 527 F.2d at 794, 795, notes 7 and 9.

the petitioners here have relied upon heavily, and stated (*id.* at 795):

While it is true that each mining plan prepared for tracts within the leased area is to a significant degree an independent project which requires a separate EIS with respect to each, it is no less true that the breadth and scope of the possible projects made possible by the Secretary's approval of the leases require the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval.

The court explained that "it cannot be denied that the environmental consequences of several strip mining projects extending over twenty years or more within a tract of 30,876.45 acres will be significantly different from those which will accompany Westmoreland's activities on a single tract of 770 acres." ¹⁸ *Ibid.* Thus, the crucial criterion for the scope of an environmental impact statement was deemed to be, as this Court found in SCRAP (see our discussion on pp. 58-60 below), the nature and effect of the particular federal decision.

In the recent case of *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, (1975), the Court of Appeals for the Second Circuit considered the plaintiffs' claim that an environmental impact statement prepared for a particular Navy project to dredge and dump spoils in Long Island Sound was inadequate because of its failure to consider other pending proposals, some by other government agencies and at least one by a private

¹⁸ The federal petitioners characterize (Fed. Br. 36, note 28) *Cady v. Morton* as holding that "the appropriate unit for environmental study is a single mining lease." That is inaccurate. The court ruled, agreeing entirely with the plaintiffs on this issue, that an environmental statement for a mining plan could not satisfy NEPA's requirement of analysis of the government's decision to approve the overall lease. The question of a regional statement was expressly not before the court in *Cady* since that issue was pending in the present litigation.

company, to dump spoil at the same site. The court ruled that the failure to analyze the cumulative effects of the proposals resulted in an environmental statement which "failed to furnish information essential to the environmental decision-making process." *Id.* at 87. While agreeing with the District of Columbia Circuit that NEPA does not require a "crystal ball" inquiry," the court went on to caution that "agency may not go to the opposite extreme of treating a project as an isolated 'single-shot' venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area." *Id.* at 88. The court continued (*ibid.*):

As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources.

* * *

NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration. * * * The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely.

Thus, although none of the other projects to dump had final approval, the court nonetheless held that (*id.* at 89):

¹⁹ *Natural Resources Defense Council v. Morton*, *supra*, 458 F.2d at 837.

[A]ll are well beyond the stage of mere speculation and should have been included in the Navy's analysis of environmental impacts. * * * Clearly, the projects are closely enough related so that they can be expected to produce a cumulative environmental impact which must be evaluated as a whole.

Numerous district court decisions have come to the same conclusion. In *Illinois v. Butterfield*, 396 F. Supp. 632 (N.D. Ill. 1975), one of the claims before the court was that the cumulative effect of a series of separate federal actions constituted a "major federal action" within the meaning of Section 102(2)(C) of NEPA. The court found that the claim properly stated "defendants' failure to prepare an impact statement with respect to the collective impact of certain actions as opposed to an impact statement for just particular actions." *Id.* at 640-641. The court then quoted from the CEQ Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements of May 16, 1972 (*id.* at 641):

Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single program statement. * * * The program statement has a number of advantages. It provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions.

In *Natural Resources Defense Council v. Grant*, 355 F. Supp. 280, 288-289 (E.D. N.C. 1973), the district court held that the environmental impact statement on the Chicod Creek Watershed Project must "consider fully * * * the cumulative impact of [that project] and other channelization projects on the environmental and eco-

nomie resources of Eastern North Carolina" including the "cumulative effect of sedimentation" and the "cumulative impact of drainage projects upon hardwood timber of groundwater resources."

In *Conservation Council v. Costanzo*, 398 F. Supp. 653 (E.D.N.C. 1975), the district court considered whether approval of the construction of a marina required preparation of an environmental impact statement. In ruling that such an analysis was necessary, the court noted that, "[u]nder applicable principles of law, the cumulative effects of any federal action must be considered in determining the significance of the impact of the federal action on the human environment." *Id.* at 672.

Finally, a recent decision of the District Court for the District of Columbia considered the adequacy of an environmental impact statement prepared to analyze the effects of moving the Naval Oceanographic Program from its present site in Maryland to Bay St. Louis, Mississippi. *Prince George's County v. Holloway*, 404 F.Supp. 1181 (D.D.C. 1975). Judge Gesell held that the statement was defective because it omitted consideration of other potential relocations by other agencies to the same general site. The court noted (*id.* at 1186):

[W]hile neither of these projects has received final approval, they have advanced beyond the point of conjecture and speculation. * * * In such a situation, the National Environmental Policy Act requires the impact statement to consider the cumulative environmental effect that the relatively concurrent federal actions may have at the common site. One of the primary purposes of the Act was to prevent the very type of fragmented and compartmentalized analysis that occurred here. Instead, the statute directs that the agency employ a more integrated and comprehensive approach which takes account of the overall effect of the various projects.

These lower court decisions concerning the need for a comprehensive environmental statement when a number of federal actions are related is fully consistent with this Court's decision in SCRAP II. SCRAP II involved review of a determination of the Interstate Commerce Commission not to forbid a general rate increase proposed by the Nation's railroads, in response to a contention that inadequate consideration had been given to environmental factors. Individual rates may be challenged on the grounds that they are unjust and unreasonable. 49 U.S.C. 15. The ICC proceeding in SCRAP II, however, was a general revenue proceeding which is initiated when an across-the-board, flat percentage rate increase is proposed with the justification that the railroads' needs for immediate revenue require it. The issues before the ICC in such a proceeding are extremely narrow. 422 U.S. at 323-327.

In light of these circumstances, this Court stated as to the scope of the environmental statement (*id.* at 322):

In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the "federal action" being taken. The action taken here was a decision—entirely nonfinal with respect to particular rates—not to declare unlawful a *percentage increase* which on its face applied equally to virgin and some recyclable materials and which on its face limited the increase permitted on other recyclables. As in most general revenue proceedings, the "action" was taken in response to the railroads' claim of a financial crisis; and the inquiry * * * was primarily into the question whether such a crisis—usually thought to entitle the railroads to the general increase—existed, leaving *primarily* to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof. The point is that it is the latter question—usually involved in a

general revenue proceeding only to a limited extent—which may raise the most serious environmental issues. The former question—the entitlement of the railroads to some kind of a general rate increase—raises few environmental issues and none which are claimed in this case to have been inadequately addressed in the impact statement. (emphasis in original; footnotes omitted)

This Court then, in light of the "limited nature of the decision" in the general rate proceeding, approved the "apparently sensible decision by the ICC to take much more limited 'action' in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task" (emphasis in original). *Id.* at 327, 326.

All the factors considered by this Court in SCRAP II make clear that the full requirements of NEPA apply to the actions being taken by the federal petitioners. As we have seen above, the federal action in the instant case is not a solitary approval of a mine or the isolated grant of a right-of-way. Rather, here there have already been dozens of actions taken and hundreds more are likely in the near future. These actions are final determinations. They are not subject to review or reversal in subsequent proceedings.⁹⁰ Taken together, they constitute a commit-

⁹⁰ For example, the decision of the Department of the Interior to issue a coal mining lease is final and virtually irrevocable. In *Union Oil v. Morton*, 512 F.2d 743 (1975), the Court of Appeals for the Ninth Circuit ruled in regard to a comparable lease for oil that the Secretary of the Interior could not terminate the lease without treating it as a taking of property for which due compensation would have to be paid. The Department takes the position that it therefore cannot prevent development of an existing lease, unless it is given authority by Congress, in effect, to condemn and pay compensation or to require substitution of lands in a lease. Answers of Secretary Kleppe to Questions Submitted by the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee, in connection with the hearing of February 16, 1976, #19 (hereafter Answers of Secretary Kleppe). Thus, whatever

ment to intensive energy development of the Northern Great Plains. We submit that the federal actions being taken, involving numerous related actions seriously affecting the environment of an entire region, require the preparation of a regional environmental impact statement.⁸¹

Petitioners rely on a group of decisions to argue that environmental statements may be restricted to a particular proposed action even though that action may be related to other Federal actions. Fed. Br. 36, note 28; AEP Br. 37-43. Respondents submit that scrutiny of these decisions merely reveals the extent to which they depend on their particular facts. As we have seen, the Court of Appeals for the Ninth Circuit clearly so found in rejecting the same proposition urged by petitioners. In so doing, it distinguished its own previous rulings and held instead that an environmental statement on a specific federal action—approval of a mining plan—was not sufficient since no broader environmental statement. *Cady v. Morton*, *supra*, 527 F.2d at 794-795.

environmental assessment is to be done regarding coal leasing, it must precede the decision to issue the lease. A failure to conduct a proper analysis prior to that decision cannot later be rectified by reconsideration.

⁸¹ This Court in SCRAP II carefully pointed out the distinction between the limited role of the ICC in a general revenue proceeding and the type of decision which another sort of agency can make "for example, that of an agency deciding whether and where to build a new prison." 422 U.S. at 323, note 21. The function of the Department of the Interior here is far more analogous to that of the Department of Justice in the case of *Hanly v. Mitchell*, 460 F.2d 640 (C.A. 2, 1972), cited by the Court. The Department of the Interior has the power to decide not to issue any lease (see, for example, the moratorium decided upon by Secretary Morton in 1973, described in the Affidavit of Secretary Kleppe (App. 189)), or to determine the system for leasing (see AEP Br. App. 1a-14a). There is no statutory requirement that the Department of the Interior must issue leases, only broad discretionary power to do so under regulations of its own adoption. 30 U.S.C. 201(a).

Thus, *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (C.A. 9, 1974), and *Sierra Club v. Callaway*, 499 F.2d 982, 990 (C.A. 5, 1974), depend heavily on the fact that Congress had separately approved and authorized funding for each project at issue in those cases. Moreover, the court in *Sierra Club v. Callaway* stressed the extremely uncertain and long-range nature of the broader project of which the specific dam was claimed to be a part and emphasized that the dam was already 72 percent complete. *Id.* at 988. Similarly, in *Sierra Club v. Stamm*, 507 F.2d 788, 794 (C.A. 10, 1974), the court did not require a broader environmental statement because the overall project would not be completed until sometime in the next century. On the other hand, in *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19-20 (C.A. 8, 1973), based on the particular facts of that case, the court of appeals required the preparation of an environmental statement broader in scope than that which the federal agency had prepared, even though narrower than the plaintiffs had sought.⁸²

AEP petitioners cite (AEP Br. 37), as a common thread in many of the decisions on which they rely, the fact that individual projects have often been approved where the courts found "the proposed project had independent utility so that its approval did not commit the government to other aspects of the overall project, program or plan." The federal petitioners, on the other hand, agree (Fed. Br. 51, note 38) with the view of the respondents that instead of looking at some "independent utility" of the project, "it is more appropriate to look

⁸² In *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (C.A. 9, 1973), the question was not directly the scope of the environmental statements on the three electric power plants, but rather whether the Department of the Interior should have withheld approval until its Southwest Energy Study had been completed. The court there ruled that it was not necessary to wait until all possible facts were known. This question is not in issue in the instant case.

to the language of NEPA to determine when an impact statement is necessary and what the appropriate scope of that statement should be." Thus, the federal petitioners appear to agree, as SCRAP II strongly suggests, that, in determining whether a comprehensive environmental statement is required by NEPA, each situation must be evaluated in terms of its particular facts. This approach was expressly recognized by the Court of Appeals for the Fifth Circuit in *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (1975). There, the district court had ruled that the highway project at issue was not "improperly segmented for the purpose of environmental analysis * * *." *Id.* at 870. The court of appeals determined that the district court "came to an improper conclusion" because there were genuine issues of material fact so that summary judgment for the defendants was erroneous. *Ibid.*

3. The Council on Environmental Quality, the Environmental Protection Agency, and Other Federal Agencies Have Interpreted NEPA to Require the Preparation of Comprehensive Environmental Impact Statements to Consider Related Federal Actions

We have shown above that the federal courts have often held that NEPA requires the preparation of comprehensive environmental statements to consider related federal actions affecting the environment. This has likewise been the administrative interpretation of NEPA by the Council on Environmental Quality, Environmental Protection Agency, the Department of the Interior, and numerous other federal agencies.

a. *The Council on Environmental Quality and Environmental Protection Agency.* CEQ and EPA have each construed the requirements of the National Environmental Policy Act with regard to comprehensive environmental statements. CEQ's interpretation of NEPA in

this regard, prior to its formalization in the CEQ Guidelines, was first stated in 1971. Its General Counsel explained that a comprehensive statement, rather than an individual statement, should be prepared in situations where it is important to "ensure consideration of cumulative effects and make possible a more exhaustive examination of effects and alternatives than would be possible in an environmental statement on each individual action." Quoted in *Natural Resources Defense Council v. TVA*, 367 F. Supp. 128 (E.D. Tenn. 1973).

The original CEQ Guidelines, issued in April 1971, similarly stated (36 Fed. Reg. 7724):

The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action (and of further actions contemplated).

The present Guidelines contain almost the identical statement and then describe how federal actions can be "cumulatively considerable" (40 C.F.R. 1500.6(a); 38 Fed. Reg. 20551):

This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action.

The present Guidelines then go on to state (40 C.F.R. 1500.6(d)(1); 38 Fed. Reg. 20552):

Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program

statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments).

The Environmental Protection Agency has likewise strongly supported comprehensive environmental impacts statements. In transmitting EPA's comments on the proposed guidelines to CEQ, the Administrator of EPA cited the particular importance of comprehensive statements on interrelated federal actions (Letter from William D. Ruckelshaus to Russell E. Train, in Hearings on the Administration of the National Environmental Policy Act—1972, Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, No. 92-94, 92d Cong., 2d Sess. 368-369 (1972)):

Our second suggestion aims at resolving the difficulty of putting into perspective the environmental effects of closely inter-related activities. This frequently occurs in two types of situations. In the first situation, major components of a single large project are analyzed through separate impact statements, and often the most damaging components are analyzed only after substantial resources have been committed to other components of the project. In the second situation, a number of independently proposed projects having cumulative environmental effects on a small geographical area are analyzed without regard to each other. We therefore suggest that, to the greatest extent possible in these two types of situations, over-view statements be required. These over-view statements would be in addition to the impact statements on the specific project or com-

ponent, and would provide the necessary perspective against which the needs, environmental effects, and alternatives for both the system of projects and the specific project could be assessed.

b. *The Department of the Interior.* Even prior to its recent decision to do regional environmental statements when taking a number of related actions in the same geographical area, the regulations of the Department of the Interior supported the practice of doing comprehensive environmental statements. In the instructions to carry out "the policy and directives of the National Environmental Policy Act" (Section 516.11), the Department elaborated on what should be considered a major federal action significantly affecting the quality of the human environment (Department of the Interior Manual, Section 516.2.5B):

The statutory clause * * * is to be construed with a view to the overall, cumulative impact of the action proposed, and of further actions contemplated. * * *

(1) In considering what constitutes a major Federal action, bureaus and offices should bear in mind that the effect of many decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when * * * one decision * * * is a precedent for action in much larger cases or presents a decision in principle about a future major course of action, or when several government entities individually make decisions about partial aspects of a major action.

The environmental statements under this section would of course have to deal with the cumulative effects of the actions involved.

CEQ, in carrying out its responsibility to monitor the effect and functioning of the NEPA process (see p. 98 below), sent to a number of government agencies a set of questions, including questions regarding the use of

policy and program impact statements. CEQ, Review of Implementation of the National Environmental Policy Act Questions and Outline for Response. In response, the Department of the Interior explained (Answer to Question 3.02):

Strong emphasis and support has been given bureaus * * * to utilize various types of program statements to assist in reducing the scope and size of subsequent statements, particularly where a large number of smaller actions are contemplated or where cumulative impacts and program alternatives are inappropriately analyzed on a project-by-project basis.

The Department then listed some 18 "major program type statements"⁸³ which it had prepared or planned

⁸³ The Department listed the following environmental statements:

Bureau of Reclamation:

Atmospheric Water Resources Program
Colorado River Basin International Salinity Control Project
Fryingpan-Arkansas Project
Columbia Basin Project

Bureau of Land Management:

Timber Management Program
Federal Coal Leasing Program
Livestock Grazing Management Program
Upland Oil and Gas Leasing Program
OCS Accelerated Oil and Gas Leasing Program

Fish and Wildlife Service:

Sport Hunting of Migratory Birds
Wildlife Refuge Management Program

Bureau of Mines:

Mine Subsidence Control Program
Mine Fire Control Program

Southwestern Power Administration:

Operating and Maintenance Program

Bonneville Power Administration:

Annual Construction Programs

[Footnote continued on page 67]

to prepare during fiscal years 1975 and 1976. The Department indicated that comprehensive statements were of two types, depending on the particular program involved: "(1) nationwide program statements at the highest order of scale, (2) area or regional statements with a specific geographic extent * * *" (Answer to Question 3.01). The Department responded as to the value of comprehensive statements (Answer to Question 3.03):

[P]rogram environmental statements have served the decision process in Interior. The service may not always be dramatic, but it covers an important level in decisionmaking. They provide the only large-scale environmental analyses of program-wide regulations, long-term cumulative program effects, and program alternatives. Because of their scope, they tend to focus environmental analyses on broader issues or issues of a longer term nature. For example, the Eastern Powder River Coal Development statement produced greater awareness of water problems in Wyoming than individual statements on mining plans would have done.

We believe also that we can see a definite improvement in the planning process itself as well as in plan implementation because of program environmental statements. This is because the program statement focuses planning attention much more forcefully on repetitive, aggregative, and cumulative problems.

Particular agencies of the Department of the Interior expressed similar use of, and enthusiasm for, comprehensive environmental statements. The National Park Service stated (Answer to Question 3.03):

⁸³ [Continued]

Geological Survey:

Santa Barbara Channel Oil and Gas Development
Southeastern Idaho Phosphate Development

Bureau of Indian Affairs:

Crow Reservation Coal Development

Program EIS's have and will continue to examine a wide range of alternatives upon which a decision can be made. Further, the program statement is the appropriate level for examining interrelated actions as well as cumulative impact. Project level statements speak primarily to impacts on a specific site and therefore do not aid in decisions which must consider broad issues.

Question 3.05 asked: "Does the agency use the policy or program EIS (1) to help assess alternatives, (2) to help assess cumulative effects of similar or otherwise related projects involving one or more agencies, (3) to serve as guides to subsequent project-level EIS's, or (4) to serve several or all of such purposes?" The National Park Service replied that it used the "program environmental statement to serve all of the purposes outlined in the question."

The Bureau of Reclamation stated that it is "utilizing the overall project environmental statement to look at cumulative impacts of its larger projects" (Answer to Question 3.02). The Bureau of Outdoor Recreation said that it (Answer to Question 3.05):

used the policy EIS to help assess cumulative effects of similar or otherwise related projects involving one or more agencies. In view of the interrelationships of outdoor recreation programs, facilities, and services of the major Federal land managing agencies, the cumulative effects of the combined efforts and actions of these agencies were given serious consideration and assessed in terms of their total effect, and through the EIS process, these issues were addressed and decisions made thereon.

In sum, not only has the Department of the Interior adopted the position of the respondents, that broad-scale analysis of cumulative effect must be prepared, but even has discovered that they have exactly that utility

which respondents have claimed (see pp. 89-95 below). The "greater awareness of water problems in Wyoming" produced by the Eastern Powder River Statement⁴⁴ is precisely the sort of understanding which respondents have argued could be produced only by comprehensive environmental statements rather than individual, site-specific analyses.

c. *Other Federal Agencies.* Many other departments and agencies have adopted a policy of employing broad, comprehensive environmental statements. The circumstances calling for such statements depend of course on the nature of the federal action being considered and thus on the function of the particular agency. For example, the Department of Housing and Urban Development has adopted the following regulation (38 Fed. Reg. 19185):

(5) Evaluation of comprehensive activities.

Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project's specific im-

⁴⁴ We will discuss below (pp. 102-108) whether the scope of the Eastern Powder River Statement is in fact adequate for proper analysis of the vast environmental impacts of coal development in the Northern Great Plains. Nonetheless, whether or not the scope of the statement is sufficient, it is conceded by the Department to constitute a useful, regional analysis.

pact of component activities to the extent known.

The Forest Service employs what it terms a "3-tier approach." See Statement of John R. McGuire, Chief, Forest Service, National Environmental Policy Act Oversight Hearings, *supra*, pp. 39-40. The broadest type of environmental statement is the program document. The second tier is the unit plan, based on the Forest Service's land use planning system under which "lands are divided into large planning areas which are specific geographic areas containing social and physical resources and land characteristics of a generally similar nature. . . . The unit plan becomes the basis for all action within the specific geographic area. It provides a guide as to what, where, and when various resource activities will be carried out." *Id.* at 40. The third tier is the site specific or project environmental statement. Mr. McGuire went on to distinguish between the uses of the broader statements and the project statement, noting that "a project statement can address site specific factors but not the cumulative effects of many different types of projects." *Id.* at 41. Forest Service regulations encourage use of broad environmental statements, noting that "program statements will be appropriate in order to assess the environmental effects of a number of individual actions in a given geographical area." Forest Service Manual, Section 8411.43. "A programmatic approach has the advantage of permitting the analysis of cumulative effects or possible synergistic effects of a series or group of actions." *Id.*, Section 8411.44.

The Army Corps of Engineers informed CEQ (Answer to Question 3.02):

Corps regulations call for the preparation of composite environmental statements which group several similar projects which serve the same general purpose because of their relationship geographically

or involve common or similar environmental impacts. . . . The purpose of these composite statements is to reduce the number of statements and address the cumulative impacts of the projects as a group rather than on an individual basis.

Asked how the Corps employs a policy or program environmental statement (Answer to Question 3.05), the Corps responded:

For selected program EIS's, covering a variety of Corps activities, alternatives are discussed and evaluated to determine general trends and cumulative impacts induced by the project or on similar projects as a group rather than on an individual basis. The significance of the regional, national and international impacts produced by the project supported by information regarding the relative scarcity or abundance of the environmental resources in question is also discussed and evaluated.

The Army noted that it encourages preparation of "[p]rogram or generic EISs wherever possible" (Answer to Question 3.01) and said that, in contrast to project environmental statements, the "policy or program EISs serve to bring together the many facets of an action and enable the overall environmental impact to be assessed" (Answer to Question 3.03).

The Department of Transportation has taken the position that environmental statements (Department of Transportation, Procedures for Considering Environmental Impacts (Section 7.h, 39 Fed. Reg. 35238)):

must be broad enough in scope to avoid segmentation of projects and to insure meaningful consideration of alternatives. In certain circumstances, statements will be required for broad programs in order to assess the environmental effects of a number of actions in a geographical area, the environmental impacts that are generic or common to a series of actions, or the overall impact of a chain of contemplated projects.

The Environmental Protection Agency urges preparation of environmental impact statements for total programs which include "component projects" and points out that even where there are "a number of minor, environmentally insignificant actions," the "cumulative environmental impact of all of these actions shall be evaluated" if the minor actions are "similar in execution and purpose, during a limited time span and in the same general geographic area." 40 Fed.Reg. 16817. The National Aeronautics and Space Administration has carried out its responsibilities under NEPA through "institutional" and "program" statements, both of which "tend to be 'broad program statements' by the CEQ definition * * *." 39 Fed. Reg. 13001. The Department of Commerce, which has established guidelines for preparing policy and program as well as project environmental statements, described the utility of comprehensive statements (Answer to Question 3.03): "A policy or program EIS in the development and enforcement of administrative or regulatory controls could be of major assistance in projecting the social and economic costs along with the purported environmental benefits of the proposed action."

In short, virtually all of the agencies of the federal government whose actions frequently affect the environment have perceived the need, in order to carry out the requirements of NEPA, of preparing comprehensive environmental impact statements to enable them to evaluate the broad implications of cumulative actions, whether they are related geographically or in other ways. Thus, the present policy of the Department of the Interior simply brings it into conformity with the general practice of the federal government.

C. THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRES THE PREPARATION OF A REGIONAL ENVIRONMENTAL STATEMENT CONCERNING COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS BECAUSE OF THE NUMBER AND CLOSE RELATIONSHIP OF THE FEDERAL ACTIONS BEING TAKEN

We have seen above that the language, history, and judicial and administrative interpretation of NEPA is that comprehensive statements are required concerning related federal actions. We will now show that the numerous federal actions concerning coal development in the Northern Great Plains constitute such a situation requiring preparation of a comprehensive environmental impact statement.

1. The Federal Actions Involved in Coal Development of the Northern Great Plains Are Related in a Manner Requiring Preparation of a Comprehensive Environmental Impact Statement

The Guidelines of the Council on Environmental Quality state that "broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area * * *, or environmental impacts that are generic or common to a series of agency actions * * *, or the overall impact of a large-scale program or chain of contemplated projects * * *." 40 C.F.R. 1500.6(d)(1); 38 Fed. Reg. 20552. Thus, the Guidelines state that a comprehensive environmental statement is required when federal actions are geographically, environmentally, or programatically related. Respondents submit that the numerous federal coal and coal-dependent actions in the Northern Great Plains region are related under each of these criteria.

The geographic relationship is clear. All the federal actions involve coal development in a particular geo-

graphic area. As we will see below (pp. 102-108), the appropriate region is the area of the Fort Union and Powder River coal formation.

The second type of relationship, the environmental relationship, is probably the most crucial in the context of this case. The numerous projects resulting from the past and proposed federal action in the Northern Great Plains will produce a wide variety of cumulative environmental impacts.

For example, the court of appeals properly referred to the cumulative effect of coal-related projects on the availability of water. Fed. Reg. App. A, p. 38A, note 28. The climatological characterization of most of the Northern Great Plains is semi-arid to arid. NGPR Program Report, p. 45. Much of the present water supply depends on subsurface sources, whether carried in shallow aquifers which often rest on the impermeable beds of coal, or contained in deep rock formations such as the Madison Limestone formation underlying the Powder River area of Wyoming. Eastern Powder River Statement, pp. I-195 to I-217. Recharge of these waters depends on infiltration of precipitation and movement of waters between aquifers. *Id.* at I-217 to I-229. Removal of the coal aquifers through mining destroys that shallow resource. In areas where grasses and hay meadows rely on subsurface irrigation provided by the coal aquifers, there will be an adverse, probably destructive, impact on the vegetation.

Coal-related development requires huge amounts of water. Electric power plants consume for cooling purposes approximately 10,000 to 12,000 acre feet of water per year, for every 1000 megawatts. NGPR Program Report, p. 7). Since these waters are evaporated, they are lost for other use. Coal gasification plants depend on vast quantities of water, approximately 10,000 acre feet per year, for the gasification process. NGPR Program Report, p. 72. It also is lost through evaporation. Slurry

pipelines for the transportation of coal use water to carry finely ground coal particles from point of origin to the destination, where the coal is dried by evaporating the water and is then burned. The proposed coal slurry pipeline from the Powder River Basin in Wyoming to a power facility in Arkansas is estimated to require 6.5 billion gallons of water per year which, it is proposed, will be obtained from the Madison Formation. Washington Post, December 1, 1975, p. A-1. This water will not return. Increases in population will mean additional water consumption for various domestic and commercial uses.

Water is a regional resource. For example, the Madison Formation "extends from Wyoming into Montana, North and South Dakota, portions of Nebraska, north to Canada and south to Colorado and Utah." Underground Water in the Madison Limestone, reprinted in Greater Coal Utilization, Joint Hearings of the Senate Committees on Interior and Insular Affairs and Public Works, S. No. 94-18, 94th Cong., 1st Sess. 447 (1975). Similarly, the Yellowstone River and its tributaries drain the coal areas of northeastern Wyoming and southeastern Montana. The Upper Missouri River drains the entire Northern Great Plains region. Water is obviously a finite resource within any given area and particularly in a semi-arid region like the Northern Great Plains. Each commitment of water resources affects future possible commitments. Each project which consumes large quantities of water has an effect far beyond its own scope, both physically, in terms of water circulation and recharge, and temporally, since it may preclude some other form of development in the future. The consumption of water by one project will mean that less water is available for agriculture, wildlife, human consumption, and other industrial projects.

If all related federal actions are not considered together, the analysis of the impact of a particular project

and the alternative uses of water will be impossible. One project all by itself may cause little harm. On the other hand, numerous projects may mean that agricultural and wildlife uses downstream will be severely interfered with. The combination of projects may require a rational system of water allocation which will maximize use of the water to protect the competing uses to the maximum extent possible. A comprehensive analysis is essential if this alternative, of allocating water to priority use, is to be fairly considered. Similarly, only a comprehensive analysis is likely to lead to requirements that projects use the best technology available to reduce consumption of water.

For these reasons, the scope of analysis must extend beyond the particular project to others using substantial amounts of water from the same sources. Not only NEPA but common sense requires such analysis.⁸⁵

Strip mines, power plants, and coal gasification plants all cause water pollution if the water used by them is discharged so that it may enter ground water or streams. NGPR Program Report, pp. 91-95. This pollution is obviously cumulative if several projects discharge into the same body of water. Again, if a single project is analyzed it may well be found to cause little damage. Taken together, the opposite may be true. The result of a comprehensive analysis may well be to determine what level of pollution will be allowed and, in effect, to allocate it so that only the highest priority projects are permitted. Alternatively, such cumulative analysis might lead to approving only projects which eliminate or at least minimize pollution discharges.

⁸⁵ The need for regional consideration of water resources has been expressly recognized by the Department of the Interior. As we quoted above, the Department told CEQ that "the Eastern Powder River Coal Development Statement produced greater awareness of water problems in Wyoming than individual statements on mining plans would have done." Answer of the Department of the Interior to CEQ Question 3.03.

Air of course moves regardless of political boundaries or artificial lines. Air pollution therefore results not only from the power plant in the immediate vicinity, but from others upwind, and increases with each additional facility. The extent of pollution cannot be determined by looking at only one project, or even at only one area bounded by maps rather than meteorology. Again, a comprehensive analysis might lead to establishing a level of pollution which would be permitted and allocating it rationally or requiring especially strict pollution controls to prevent pollution from occurring.

The various projects are also interrelated environmentally because they increase population in the region. This results not merely from the employees themselves but their families, the numerous people who are needed to provide commercial and governmental services for them, and their families. Again, the cumulative effect of the projects is likely to be far different than for any individual project alone. Similarly, comprehensive analysis is likely to lead to consideration of far different alternatives such as tax and grant programs to provide the greatly increased need for education, law enforcement, and social services, the adoption of land use planning, and the creation of new towns.

These so-called secondary impacts are of great importance. EPA has pointed out (Hearings on the Administration of the National Environmental Policy Act—1972, *supra*, p. 372):

In setting forth the range of environmental considerations appropriate for a particular type of project, the conceptual framework must go beyond obvious questions such as air and water pollution. . . . Impacts on population patterns or community behavioral patterns may affect the quality of the human environment much more than impacts on air and solid waste.

The CEQ Guidelines specifically require consideration of such secondary impacts in environmental statements. 40 C.F.R. 1500.6(b); 38 Fed. Reg. 20551.

The Eastern Powder River Statement admits that the secondary effects of coal development will be irrevocable (p. I-859):

Development of coal resources in the Eastern Powder River Coal Basin of Wyoming will produce a region completely different from that existing at present. Industrial history suggests that changes will develop over time and will be of very long term—for practical purposes, permanent.

* * *

Both short-term and long-term development and use of regional resources will change long-term productivity of the basin. From a typical western ranching area, it will be transformed into an industrialized region with mining of coal and its utilization becoming the dominant industry and financial foundation.

The cumulative impact of the various projects may even drastically affect the very climate of the region. According to BLM's recent Draft Environmental Impact Statement for the Proposed Reservoir on the Middle Fork of Powder River (p. 8-33):

The coal liquefaction plants would likely result in some minor changes in the micro-climate of the immediate plant areas, such as slight increases in air temperature and humidity.

In conjunction with other proposed and projected development in the Eastern Powder River Basin, climate could be affected to a significant degree.

* * *

Some evidence indicates that changes of atmospheric particulate loading and alteration of the earth-atmospheric energy balance may contribute to creation of drought conditions in semiarid climates.

This disastrous effect on an area with already insufficient rainfall would not be the result of a single industrial plant. However, the cumulative effect of a group of energy facilities may be a vast desert.

We have noted that comprehensive analysis of environmental impact is necessary to consider various alternatives to mitigate the environmental effects of numerous coal-related projects. This kind of analysis of the cumulative effect could also lead to a determination that coal should be exported from the region rather than converted to electricity or gas within it. Such an export policy would avoid most of the consumption of water, air and water pollution, increased population, and changes in climate. However, it is unlikely even to be considered unless the totality of coal development is analyzed altogether.

The Department of the Interior has itself recognized the inadequacy of project-by-project analysis. Of course, its determination to prepare regional statements reflects such a determination. Moreover, an earlier report of the Northern Great Plains Resources Program asked the question: "Is the impact of two mines or powerplants in the same areas twice as great as the impact of one, or is it larger?" NGPR Program Draft Interim Report, p. V-2. Similarly, as we quoted earlier, Robert Jones of the Bureau of Land Management recently told the House Merchant Marine and Fisheries Committee that "[o]ne project in the area might have acceptable environmental consequences, but, if you have border-to-border projects all the way across you have a substantially different environmental situation." National Environmental Policy Oversight Hearing, *supra*, p. 31.

Third, the federal actions involving coal development in the Northern Great Plains are programmatically related. Secretary of the Interior Kleppe has recently admitted this relationship. As he explained to the Senate

Interior Committee, "mining coal from one or more leases might have substantially broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands" (see App. A below, p. 3a).⁸⁶

There is a very close inter-relationship between all the various proposals for exploiting the area's coal. All the proposals are based on strip mining large quantities of coal and then either (1) having mine-mouth plants convert the coal into electricity, gas, liquid fuels or petrochemicals and using electric transmission lines, pipelines or other methods to transport these products to distant markets or (2) transporting the coal by railroad or slurry pipeline to power plants and other facilities in other areas of the country. As we have seen, tremendous quantities of water will be required to carry out any of these proposals, thus necessitating the construction of dams and reservoirs. The network of railroads, transmission lines, aqueducts and pipelines which is being built will of course serve numerous mines and facilities.⁸⁷

The argument of the federal petitioners that the only common thread between the federal activities in the Northern Great Plains is that "they all have to do with coal mining" (Fed. Br. 31, note 24) simplistically ig-

⁸⁶ Judge McKinnon, dissenting below, noted the situation where "a federal action at one point in the 'region' would cause a ripple effect which would eventually have an impact on future federal actions elsewhere in the 'region.'" Fed. Pet. App. A, p. 61A. In such a case, Judge McKinnon conceded, "this court and the Second Circuit quite properly found that an EIS for the entire project was necessary before the initial step could be taken." *Id.* at 62A. Subsequent to the court of appeals' decision and Judge McKinnon's dissent, Secretary Kleppe has admitted such a ripple effect as to coal mines in the Northern Great Plains in the statement quoted in the text.

⁸⁷ Aqueduct Report, pp. 3-12; Powder River Basin Report, p. 9.

nores the obvious fact that coal has value only as an energy source. While the key initial decision is to approve coal mining, from this all else follows. Once the coal is mined, it will be used.

The Department of the Interior certainly recognizes this fact. The NGPR Program Report, as we have seen (pp. 13-14 above), looked at the various possible uses for coal within the study region, concluding that coal development would be likely to result in as many as 25 electric power plants and 41 coal conversion plants. The transportation of coal outside of the region would of course require the installation and use of railroads or pipelines. The transmission of coal converted to energy would require erection of transmission lines or the laying of pipelines. NGPR Program Report, pp. 2, 33-38. The Eastern Powder River Statement notes that by 1990 that coal basin will probably contain 14 mines, 6 power plants, 2 coal gasification plants, 225 miles of new powerline, 150 miles of new railroad, and will be the starting point for 1040 miles of slurry pipeline. Eastern Powder River Statement, *supra*, p. I-56. This development will require at least 90,000 acre feet of water per year. *Id.* at I-58. The argument of the federal petitioners flies in the face of not only reality but also of the Department of the Interior's own analyses.⁸⁸

⁸⁸ The regulations of the Bureau of Land Management expressly direct that environmental statements must look beyond the individual project to "[d]etermine the need for the action. For example, a road is not an end in itself, but is constructed for some major purpose—perhaps to remove timber. The reason for doing this is to establish the proper scope for the environmental analysis. It may be, for example, that the analysis should be done on a timber sale, or a grouping of sales in one drainage rather than on a road." Bureau of Land Management, "Environmental Analysis," Section 2.21.B. Likewise, coal mining is not an end in itself. The proper scope of the environmental analysis depends on the "need for the action," here intensive energy development throughout the Northern Great Plains region.

The federal petitioners have treated the various activities being taken and considered concerning coal development in the Northern Great Plains region as closely related. The North Central Power Study, the Appraisal Report on Montana-Wyoming Aqueducts, and the Northern Great Plains Resource Program all focus on regional coal development. The North Central Power Study, which was initiated by the Department of the Interior and carried out by the Bureau of Reclamation and various utilities, studied possible mine-mouth electric power plants and long-distance electrical transmission lines throughout the region. Soon thereafter, the Bureau of Reclamation completed its Appraisal Report on Montana-Wyoming Aqueducts which investigated water resources for coal development in northeastern Wyoming and southeastern Montana and described a potential system of dams, reservoirs, and aqueducts throughout this large area. The Aqueduct Appraisal Report (p. 31) stated that: "The apparent impact of the development will require that full-scale comprehensive studies be initiated in the near future, in cooperation with the states and others, to assure an orderly and manageable growth pattern to minimize adverse environmental effects and impacts."⁸⁰

The Department of the Interior's Press Release announcing the NGPR Program stated that it "would be an effort to coordinate ongoing activities and would replace 'partial attempts to deal with this region' (App. 133-134). This belated federal attempt to coordinate development was instituted because activities in the region 'often are not well coordinated and decisions often are made on an ad hoc basis' (App. 135). Thus, the Program was designed to 'foster integrated consideration of basic natural resource use and protection [and] * * *

⁸⁰ Neither the North Central Power Study nor the Aqueduct Appraisal Report contains any substantive analysis of environmental considerations.

consider the full range of economic, social, and environmental consequences of alternative plans of land and resource management in the region" (App. 137).

The Secretary of the Interior specifically described the NGPR Program as "aimed at providing this control over development of * * * Northern Great Plains resources * * *." Memorandum of Secretary Morton (App. 144). More recently, the Secretary described that Program and the other earlier studies as "attempts to control development of coal * * * in the Northern Great Plains. * * * These actions * * * are attempts to control development by individual companies."⁸¹ Affidavit of Secretary Morton (App. 119).⁸¹

⁸⁰ The federal petitioners state (Fed. Br. 32) that "it is not entirely clear to us what the court of appeals means by its conclusion that the government's 'role is one of controlling development of the region'" and argue (Fed. Br. 32-34) that the government is not doing so. The petitioners appear to have forgotten that the term "control development" originated with Secretary Morton, not the court of appeals.

⁸¹ The federal petitioners (Fed. Br. 34, note 25) claim that the effect of the decision of the court of appeals will be to discourage "sophisticated studies like the Northern Great Plains Resources Program" because it may lead to a judicial conclusion that the federal government is engaging in action in the area under study. One must hope that the federal government engages in such studies only when there is good reason to do so, and there clearly was here. It could hardly be termed a frivolous undertaking, unrelated to present or future federal actions. Secretary Morton, in launching the study, stated that (App. 133):

These major coal resources will be developed, that is inevitable, but how they are developed is of national interest. As a Nation we must learn to develop our resources without the traditional environmental losses. In charging this task force with the responsibility of detailing and publicly reviewing all aspects of the proposed development with a critical view toward the strict controls which will be mandated as this program goes forward.

In any event, it is the federal petitioners' contentions which will lead federal agencies to avoid environmental studies and planning

Various federal officials have repeatedly stated that the activities involved in the coal development of the Northern Great Plains were related and required comprehensive environmental study and planning. In 1972, the Assistant Secretary for Public Land Management of the Department of the Interior, Harrison Loesch, told Congress that "it seems clear to us also that for proper development of the resources, for meeting energy needs, we have to consider coal development on at least basin-wide basis, along with all the other factors which are going to affect the environment in that area." He then stated that "[we] are presently investigating the necessity, and we think it is a necessity, of rather comprehensive study and planning effort in the large coal basin areas of Montana and Wyoming." Federal Leasing and Disposal Policies, Hearings before the Senate Interior Committee, 92d Cong., 2d Sess. 84, 85 (1972). The Department of the Interior answered questions propounded by the Committee by stating (*id.* at 189):

An assurance of orderly and timely development would require an analysis and assessment of such items as regional coal demand and the relationship to existing leases. The Department is initiating a State, local and Federal program to develop a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formations. The objective is the wise development of the region accomplished in full realization of social, economic and ecological consequences of alternative possibilities.⁹²

because only if they do so will the requirements of NEPA concerning comprehensive environmental statements apply. We, on the other hand, contend that, regardless of any federal program or plan, a comprehensive environmental statement is required when federal agencies take a number of related actions.

⁹² The Department of the Interior was apparently referring to the Northern Great Plains Resource Program even though the Depart-

Secretary of the Interior Morton wrote Senator Mansfield on July 18, 1972, that "[w]hat is needed, I believe is a major comprehensive study to evaluate alternatives regarding development concepts and their impacts, and to arrive at a sound plan for regional development * * * " (Ct. of Appeals App. 72). The Secretary had just previously announced the proposal for the NGPR Program in a memorandum to his Assistant Secretaries (Memorandum of the Secretary (App. 130)):

The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resources development with proper regard for environmental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

Secretary of Agriculture Butz wrote to Senator Mansfield, concerning the Northern Great Plains, that "there is considerable urgency and need for a coordinated mineral development strategy" (Ct. of Appeals App. 76) and to the Administrator of the Environmental Protection Agency on May 2, 1973, that "we agree that a comprehensive, systematic, and interdisciplinary study of all aspects of the development and use of coal resource is needed" (Ct. of Appeals App. 75). The Administrator of the Environmental Protection Agency stated (Ct. of Appeals App. 81):

I am deeply concerned that the increasing pressure on State and Federal agencies to permit development of these coal fields will result in a series of unilateral, uncoordinated decisions with a deleterious cumulative impact on the environmental, social and ultimately economic values of this region.

ment has subsequently claimed that the program was not designed to develop a plan for the region.

The district court found, and petitioners contend, that a regional environmental statement is not required because the federal government has not adopted a plan or program for the region. Fed. Pet. App. D, p. 99A; Fed. Br. 43-48; AEP Br. 26-28. We note that the federal petitioners did establish the Northern Great Plains Resource Program, which was clearly involved in planning analysis for the region. While no actual plan has been produced, this can clearly not be determinative.

We submit that the labels used by the federal agency are irrelevant. The federal action being taken here, no matter how labelled by the petitioners, amounts to full-scale, intensive development of the coal of the Northern Great Plains. The federal cases, CEQ Guidelines, and agency regulations which we have discussed above do not rely upon the terminology employed. Instead, they consider the relationship of the federal actions involved. Since, as we have shown above, the federal actions concerning coal development in the Northern Great Plains are closely related, they must be considered together in a regional environmental statement even though no regional plan was developed.

It would be logically absurd, and clearly inconsistent with NEPA, to determine that a federal agency has less obligation under NEPA the less planning it does. The statute repeatedly emphasizes the need for environmental planning.⁹³ NEPA requires the federal agencies "to use all practicable means * * * to improve and coordinate *Federal plans, functions, programs and resources*" to protect the environment (emphasis added). Section 101 (a), 42 U.S.C. 4321(a). In order to carry out these

⁹³ We believe that the language of NEPA does compel environmental planning. However, for purposes of this case, we need only show that NEPA requires a regional environmental statement whether or not regional planning has been done.

purposes, the very next section of NEPA requires federal agencies to "utilize a *systematic* interdisciplinary approach * * * in *planning* and in *decisionmaking* which may have an impact on man's environment"; to prepare a detailed environmental-impact statement on "major Federal actions significantly affecting the quality of the human environment" including the various alternatives presented; to "study, develop, and describe appropriate alternatives to recommended courses of action"; and to "utilize ecological information in the *planning* * * * of *resource-oriented projects*" (emphasis added). Section 102(2)(A)(B), (C), (G); 42 U.S.C. 4332(2)(A), (B), (C), (G). Thus, NEPA specifically requires planning and coordination relating to exploitation of federal resources.

The many cases decided under NEPA repeatedly emphasize that it places heavy responsibilities on federal agencies to consider all relevant environmental factors before making important decisions. As the court of appeal stated in *Natural Resources Defense Council v. Morton*, *supra*, 458 F.2d at 836, the Act requires "a comprehensive approach to environmental management wherein 'policy is established by default and inaction' and environmental decisions 'continue to be made in small but steady increments' that perpetuate the mistakes of the past without being dealt with until 'they reach crisis proportions.'"

The Department of the Interior has, in other fora, stated its belief in planning for the Northern Great Plains. Four years ago, the Assistant Secretary of the Interior for Public Land Management told Congress that planning for coal development of the region "is a necessity" and that the Department of the Interior was doing "overall land use planning." Federal Leasing and Disposal Policies. Hearing before the Senate Interior Committee, 92d Cong., 2d Sess. 85, 94 (1972). The Depart-

ment of the Interior, in answers to questions propounded by the Committee, stated that the Department was "initiating * * * a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formations." *Id.* at 189. Secretary Morton has stated that "[w]hat is needed I believe * * * is a sound plan for regional development (Ct. of Appeals App. 72), "single-purpose studies" and "piecemeal actions" must be avoided (App. 130). The Chief of the Forest Service has said that "a prerequisite to further leasing should be a plan for coordinated development" (Ct. of Appeals App. 78). As recently as February 16, 1976, the Secretary of the Interior told a Congressional committee that "we think there ought to be regional planning concerning the Northern Great Plains." Transcript, Oversight Hearings on Federal Coal Leases, *supra*, Senate Interior Committee, p. 66.

Respondents do not seek a determination by this Court that regional planning is required. While we believe that NEPA does require environmental planning, that issue is not directly involved in this case. As the complaint clearly stated (App. 23), and as we continue to maintain, respondents seek merely a regional analysis of environmental impacts and alternatives in an environmental impact statement.²⁴ We simply maintain that

²⁴ The federal petitioners (Pet. Br. 43) claim that the court of appeals required the Department of the Interior to engage in comprehensive planning not mandated by NEPA or any other statute. The court of appeals, on the contrary, expressly refused to make such a ruling. Fed. Pet. App. A, pp. 31A-32A. Rather, the court found that the many ongoing and pending actions of the federal government in the Northern Great Plains, combined with the manner in which the government had treated the region, "comprised[d], cumulatively, a major federal action." *Id.* at 34A. Respondents' argument, accepted by the court of appeals, was that it would be absurd to have the government undertake these many actions, which were admittedly environmentally significant, and

the lack of a regional plan cannot change the federal petitioners' responsibilities under NEPA.

2. A Regional Environmental Impact Statement Is Necessary to Carry Out the Specific Requirements of Section 102(2) of the National Environmental Policy Act

Respondents have shown (pp. 11-16 above) that federal agencies have already taken and will be considering in the near future numerous significant actions relating to coal development in the Northern Great Plains region which will have a substantial effect on the environment. It is impossible, except cumulatively, to analyze "the environmental impact of the proposed action[s]" (Section 102(2)(C)(i)), the "adverse environmental effects which cannot be avoided" (Section 102(2)(C)(ii)), "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" (Section 102(2)(C)(iv)), or the "irreversible and irretrievable commitments of resources" (Section 102(2)(C)(v)).

There will be substantial degradation of air quality from the numerous power plants proposed and of water quality from the many strip mines. It is obvious that these effects cannot be analyzed by considering only a single power plant or mine. The numerous power plants, coal gasification plants, slurry pipelines and other facilities will require huge amounts of water. The effect of these industrial uses in comparison to the available water supply and other uses plainly cannot be ascertained by examining only a single proposal. The effect on long-term productivity and irreversible commitments of resources due to the strip mining of farming and grazing land cannot be ascertained by examining only a

treat the region as such, and yet avoid the requirements of NEPA to prepare a regional environmental statement by simply withholding from its actions the label of "plan" or "program." *Id.* at 32A.

single mine. The effect of industrialization and urbanization on this largely uninhabited rural area cannot be determined by considering a single facility and the employees who will be attracted to it.

There will be drastic impacts outside of the Northern Great Plains as well. Hitherto, more than two-thirds of the coal produced in the United States has come from the Appalachian States. Coal Programmatic EIS, p. 8-30. Within the next decade alone, the present production of coal from the Northern Great Plains is expected to more than triple. Affidavit of Frank Zarb (App. 208). Utilities in the middle-west and south have already contracted for Northern Plains coal and it has even been shipped to West Virginia, the heart of Appalachian coal production. The impact on the already depressed economy of Appalachia of this tremendous increase in western coal production will not derive from any single mine or even from a small group of mines. This issue can only be analyzed by considering the total impacts on the east from coal production in the Northern Great Plains.⁹⁵

It is equally impossible to analyze the "alternatives to the proposed action" (Section 102(2)(C)(iii)) without considering together the numerous federal actions in the same region. The CEQ Guidelines provide as to the content of environmental impact statements (40 C.F.R. 1500.8(a)(4)), 38 Fed. Reg. 20554):

A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alterna-

⁹⁵ The need for broad regional analysis of this question is demonstrated by the cursory discussion given to it in the Eastern Powder River Statement. In a brief comparison with mining in Appalachia, the Statement notes that "[a]ll producing mines and mines now being developed both in Appalachia and in the Eastern Powder River Basin have a ready market for low-sulfur coal * * *" (p. I-805). Whether or not this is true, the same could not be said if the analysis were directed to the coal production of the entire Northern Great Plains region.

tive actions, particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects, is essential. Sufficient analysis of such alternatives and their environmental benefits, costs and risks shall accompany the proposed action through the agency review process in order not to foreclose prematurely options which might enhance environmental quality or have less detrimental effects. Examples of such alternatives include the alternative of taking no action or of postponing action pending further study; alternatives requiring actions of a significantly different nature which would provide similar benefits with different environmental impacts * * *; alternatives related to different designs or details of the proposed action which would present different environmental impacts (e.g., cooling ponds vs. cooling towers for a power plant or alternatives that will significantly conserve energy) * * *.

The Court of Appeals in the District of Columbia Circuit has similarly stated that "it is the essence and thrust of NEPA that the pertinent Statement serves to gather in one place a discussion of the relevant environmental impact of alternatives." *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834 (1972).

The importance of considering alternatives was made especially clear by Congress by adopting Section 102(2)(D) in addition to Section 102(2)(C)(iii). Section 102(2)(D) requires "all agencies of the Federal Government * * * [t]o study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This provision applies, as its language makes clear, independently of Section 102(2)(C)(iii). 40 C.F.R. 1500.6(c), 38 Fed. Reg. 20551; *Hanly v. Kleindienst*, 471 F.2d 823, 835 (C.A. 2, 1972), certiorari denied, 412 U.S. 908 (1973).

The Court of Appeals for the Second Circuit has held in *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 692, 697-698 (1972), that:

The requirements of a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in § 4332(2)(D) is the linch-pin of the entire impact statement.

Similarly, in *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 296 (C.A. 8, 1972), the court of appeals held that a "more extensive treatment of alternatives [i]s required by § 102(2)(D)" than by Section 102(2)(C) for environmental statements.

The adverse environmental impacts in this case are not inevitable since alternatives do exist. First, a study of the total effect of development, rather than just an analysis of individual pieces, could lead to the conclusion that no development should be permitted or that it should be limited to a specified number of acres to be strip mined or to a limited number of power or coal gasification plants to be built. It is significant that federal government figures show that there is approximately three times as much low-sulfur coal in the East as there is strippable low-sulfur coal in the entire West. Facts about Coal in the United States pp. 4-7, reprinted in *Greater Coal Utilization*, Joint Hearings of the Senate Interior and Public Works Committees, 94th Cong., 1st Sess. 233-236 (1975). It is further significant that eastern and mid-western coal is cheaper to deliver by train to eastern, midwestern and southern markets than coal from the Northern Great Plains. NGPR Program Report, p. 32. Thus, a regional analysis would compare the availability, cost, environmental harm, and other factors of western and eastern coal.

Second, an analysis of soil conditions, rainfall, climate and other factors throughout the whole region could lead to the conclusion that strip-mining should be continued only in portions of the region where reclamation was

most likely to be successful and should cease in other areas. This analysis is of great importance in a region where the possibilities of reclamation are extremely doubtful in some areas but significantly better in others where rainfall and other factors are more favorable. NGPR Program Report, pp. 52-55. The NGPR Program Report consequently states that "the potential for rehabilitating surface-mined land in the NGP is extremely site specific." *Id.* at 53. A decision to concentrating strip mining in a particular part of the region would mean that these areas would be industrialized but others would not be harmed. On the other hand, if present federal decision-making continues, mines and other facilities will be scattered and will cause harm to air and water quality, to wildlife, and to other elements of the environment throughout a vast region.

Third, the coal could be transported out of the region by railroad instead of locating power plants and coal gasification plants in the region which in turn will cause air and water pollution, use huge amounts of water, and produce a large increase in population. Alternatively, if industrialization is appropriate in the region, it could be decided, instead of having mine-mouth coal-burning power plants, that the coal should be converted into synthetic gas which can produce electricity in the region with far less air pollution or which can be transported by pipeline for use elsewhere.

Fourth, if it was determined that the coal was to be transported from the region, it could be decided that this should be done by railroad or slurry pipeline. A major national controversy exists concerning the cost of these competing modes of transportation. Cf. Department of the Interior, Bureau of Mines Information Circular 8690, *Long-Distance Coal Transport: Unit Trains or Slurry Pipelines* (1975), with Rieber, *et al.*, *The Coal Future: Economic and Technological Analysis of Initiatives and Innovations to Secure Fuel Supply Independence*, pre-

pared for the National Science Foundation (1975). In addition, a proper environmental analysis would compare air pollution, noise, the harm to wildlife and esthetic values, and increases in population from railroads with the substantial consumption of water in a semi-arid region by slurry pipelines.

Fifth, an analysis of the total environmental impact could result in considering alternative technological methods for developing the coal resources. As to each element of the planned development, several possible alternatives exist. It is possible to mine coal underground, thus avoiding the disruption of the land surface which strip mining produces.⁹⁶ Requirements could be imposed on power and coal gasification and liquefaction plants to use the best modern technology in order to reduce air and water pollution and minimize the use of scarce water. For example, if federal coal is to be used in mine-mouth power plants, the federal petitioners could require that these plants be air- rather than water-cooled in order to save water. Similarly, more advanced methods for controlling air pollution from electric power plants are available but are not generally used in the United States. The Environmental Protection Agency has concluded that emissions of sulfur oxides from electric power plants can be reduced 85 to 90 percent by stack gas cleaning systems. National Public Hearings on Power Plant Compliance with Sulfur Oxide Air Pollution Regulations, pp. 3, 27, 31 (1974). Urban planning and zoning laws could be required before major industrialization began.

Respondents of course do not ask the Court to decide between mining in the Northern Great Plains or in the east, between the use of low sulfur coal or sulfur-dioxide-

⁹⁶ There are fifteen times more coal reserves in the Northern Great Plains that can be extracted by deep mining than by strip mining. Environmental Policy Center, Tabulation of Coal Reserves (1973), Figures 1 and 2.

removal technology, or between deep or surface mining. Rather, NEPA requires that the federal agencies make such choices and decisions based on environmental studies and an environmental statement. Our point is that no way exists even to consider the basic alternatives without examining the coal development in the region as a whole.

Even if it is decided that development should proceed, a comprehensive environmental statement would consider what kind of development would make the maximum economic contribution to the region and the country and, at the same time, would best protect the environment. It would consider how the maximum coal could be mined with the minimum land destroyed, how the most energy could be produced with the least amount of water consumed, and how the most electricity could be generated in return for whatever level of additional air pollution is deemed acceptable, as well as legal, under the Clean Air Act. This cannot possibly be accomplished on the basis of environmental statements relating to isolated decisions but demands overall consideration of the principal alternatives which exist.

3. The Council on Environmental Quality and Environmental Protection Agency Have Concluded that the Preparation of a Regional Environmental Impact Statement Concerning the Northern Great Plains Is Required by the National Environmental Policy Act

The Council on Environmental Quality and Environmental Protection Agency have analyzed the coal developments in the Northern Great Plains and come to specific conclusions concerning the requirements of NEPA concerning this development. As we have quoted above, the CEQ Guidelines state that "[i]n many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases) * * *." 40

C.F.R. 1500.6(d)(1); 38 Fed. Reg. 20552. Since the major focus for federal coal leasing is the Northern Great Plains, it is clear that the example given in this provision of the Guidelines for a regional environmental statement is the very situation which is the subject of this litigation.

A CEQ staff memorandum dated December 28, 1973 is even more clear. It described how the Department of the Interior was violating the National Environmental Policy Act concerning coal development in the Northern Great Plains and stated that "the important requirements for adequate environmental analysis," *inter alia*, included (Addendum A to Appellants' Reply Brief in the Court of Appeals, p. A-5):

Preparation of a draft "coal development program environmental impact statement" encompassing the regional and secondary impacts of coal development on Federal and Indian lands in the Northern Great Plains.

On January 15, 1974, that memorandum was sent by the Chairman of the Council to the Secretary of the Interior, with his own letter stating (*id.*, p. A-1):

An extensive amount of coal is already committed for development—in the form of outstanding leases and pending applications for preference right leases—and the Council believes that this pending development must be given timely and careful examination, as required by NEPA.

More recently, in a "Memorandum to the Heads of Agencies" dated November 26, 1975, the Chairman of CEQ pointed out (p. 4):

Agencies which sponsor incremental actions with cumulative significant impacts (e.g., individual coal

leases or highway segments) should continue the practice of preparing program statements covering the cumulative environmental effects of the broader programs, as prescribed in Sec. 1500.5 of CEQ's Guidelines.

Finally, CEQ's position was presented at the hearing on February 16, 1975, before the Subcommittee on Minerals, Materials and Fuels of the Senate Interior Committee by Chairman Peterson (Testimony, p. 7):

CEQ interprets NEPA to require that a program environmental impact statement be prepared whenever a number of actions in a geographical area have cumulative impacts that cannot be adequately analyzed and treated in individual site specific environmental impact statements. The Department [of the Interior] recognizes this principle.

In response to supplementary questions posed by Senator Metcalf, Chairman Peterson again noted that "the Department has agreed to prepare regional coal EIS's. We commend that decision and stand ready to work with the Department outlining the range of impacts and alternatives to be considered in those statements." Peterson, Answers to Senator Metcalf's Supplementary Questions, filed with the Senate Interior Committee.

The other federal agency primarily entrusted with environmental concerns, the Environmental Protection Agency, has likewise concluded that the National Environmental Policy Act requires preparation of a comprehensive environmental impact statement before federal actions can be taken concerning coal development in the Northern Great Plains region. In identical letters to Secretaries Morton and Butz, the Administrator of EPA stated concerning coal development in the Northern Great Plains (Fed. Pet. App. A, p. 37A, note 28):

Environmental impact statements prepared on a project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and spirit of the National Environmental Policy Act.

The interpretations of these two agencies, CEQ and EPA, are entitled to substantial weight. CEQ was established by the Congress in NEPA itself. Congress directed CEQ "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in Title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy * * *." 42 U.S.C. 4344(3). Section 101(a) of Title I of NEPA describes the broad concerns of the Congress regarding the effects of such activities as high-density urbanization, industrial expansion, resource exploitation and technological advances.

The President, by executive order, further defined the function of CEQ. Executive Order No. 11514, March 5, 1970; 35 Fed. Reg. 4247. Among other responsibilities, CEQ was directed to "issue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act." *Id.*, Section 3(h). The CEQ Guidelines were issued pursuant to this responsibility.

EPA is entrusted with the administration and enforcement of a variety of statutes governing air and water

pollution, noise, and pesticides. The Clean Air Act of 1970 gave the Administrator of EPA particular responsibility to "review and comment in writing on the environmental impact of any matter" relating to any of the authority given the Administrator including "newly authorized Federal projects for construction and any major Federal agency action * * * to which section 4332(2)(C) * * * applies * * *." Section 309, 42 U.S.C. 1857h-7. Thus EPA, as well as CEQ, has particular, legislatively mandated, responsibility for carrying out the policies of NEPA.

It is of course well established that "[w]hen faced with a problem of statutory construction, the courts show great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, an administrative interpretation of a statute is entitled to special weight when it is adopted soon after passage. *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Udall v. Tallman*, *supra*, 380 U.S. at 16. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new.'" *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408 (1961). Accord, *e.g.*, *United States v. Zucca*, 351 U.S. 91, 96 (1956); *United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

In keeping with this doctrine, numerous lower courts have specifically held that the CEQ Guidelines constitute a persuasive interpretation of NEPA. The Court of

Appeals for the Sixth Circuit has held, as to the Guidelines, that "[s]uch an administrative interpretation by the agency charged with implementing and administering the NEPA is entitled to great weight." *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1178 (1972). Similarly, the Court of Appeals for the Second Circuit stated in *Greene County Planning Board v. FPC*, *supra*, 455 F.2d at 421, that it would "not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,' * * * has misconstrued NEPA." Accord, *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 86, note 8 (C.A. 2, 1975); *Robinson Community Club v. Volpe*, 506 F.2d 1366, 1370 (C.A. 9, 1974); *Ely v. Velde*, 451 F.2d 1120, 1135-1136, note 14 (C.A. 4, 1971); *Carolina Action v. Simon*, 389 F. Supp. 1244, 1247 (D. N.C.), affirmed, 522 F.2d 295 (C.A. 4, 1975); *Essex County Preservation Ass'n v. Campbell*, 399 F. Supp. 208, 212 (D. Mass. 1975); *Committee for Green Foothills v. Froehlke*, 5 ERC 1849, 1852, note 1 (N.D. Calif. 1973); *Forty-Seventh Street Improvement Ass'n v. Volpe*, 3 ELR 20162, 20164 (D. Colo. 1973); *Akers v. Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972); *Indian Lookout Alliance v. Volpe*, 345 F. Supp. 1167, 1171 (S.D. Iowa 1972), modified on other grounds, 481 F.2d 11 (C.A. 8, 1973); *Morningside-Lenox Ass'n v. Volpe*, 344 F. Supp. 132, 142 (N.D. Ga. 1971); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728, 744 (E.D. Ark. 1971). As Mr. Justice Douglas stated, sitting as Circuit Justice, in *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1310 (1974), as the agency "ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements * * *," CEQ's interpretation of the Act "is entitled to great weight * * *."

Thus, the Council on Environmental Quality and Environmental Protection Agency have concluded that the National Environmental Policy Act requires preparation of a regional statement concerning the Northern Great Plains. This judgment is now supported by that of the Department of the Interior itself. We submit that this judgment is entitled to great weight and is correct."

⁹⁷ The federal petitioners argue (Fed. Br. 28) that preparation of a regional environmental statement for the Northern Great Plains would cause undue delay in the "efforts of this Nation to use coal * * *." First, respondents submit that there has been ample

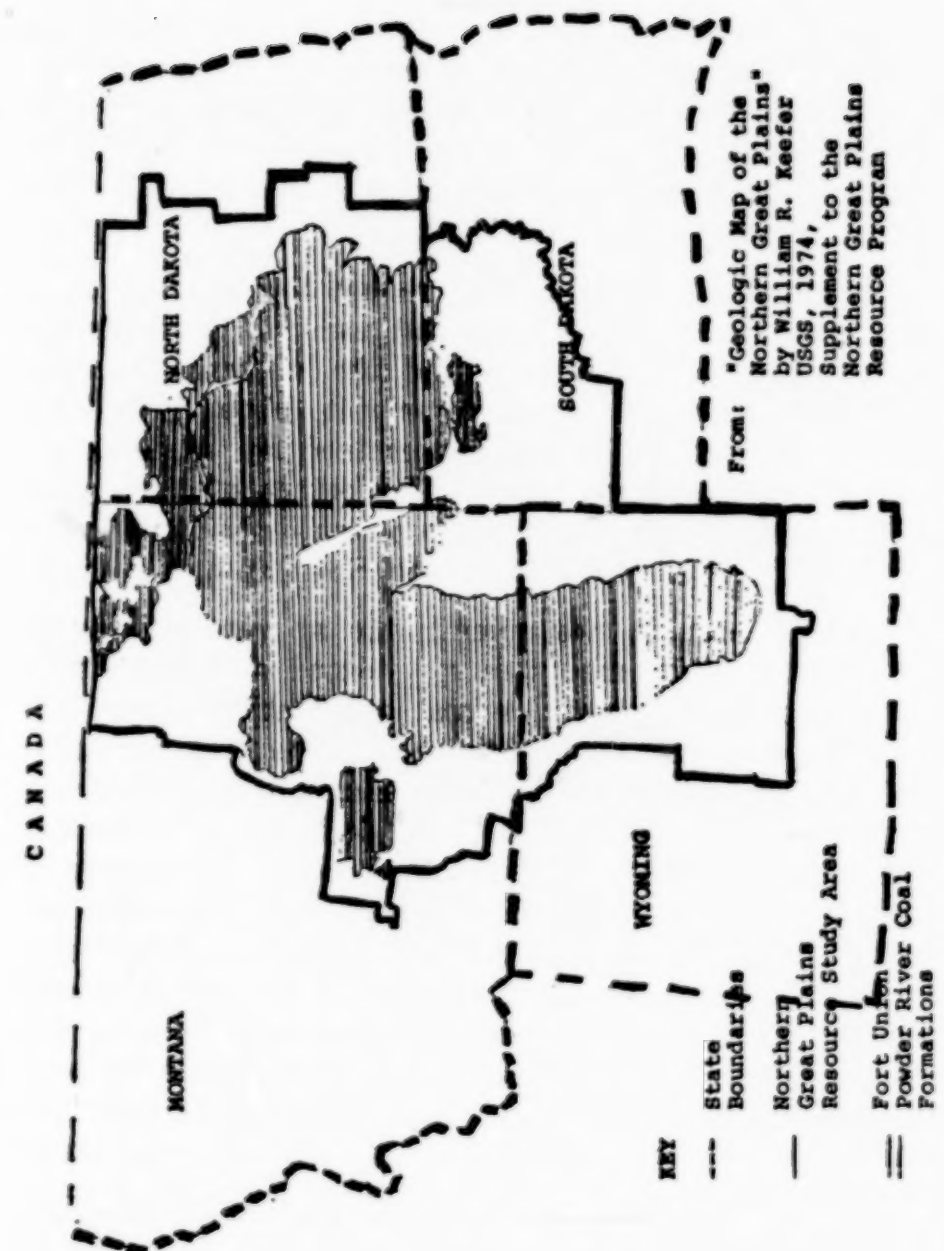
III.

NORTHEASTERN WYOMING, EASTERN MONTANA AND THE WESTERN DAKOTAS ARE THE APPROPRIATE REGION FOR A REGIONAL ENVIRONMENTAL IMPACT STATEMENT CONCERNING COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS

We have seen above that the Department of the Interior has decided, consistent with the requirements of NEPA, to prepare regional environmental statements.

time since Secretary Morton urged the Department of the Interior in 1972 to demonstrate its responsible resource development capacity to have carried out the program he described. App. 130. While the Northern Great Plains Resources Program did not prepare an environmental impact statement, the report which it published could serve as the basis for a regional statement. It would require, with the other data available on the region, only modest additional effort. There can be no comparison between the time spent on the Coal Programmatic Statement, which has a national overview of federal coal leasing, with that which would be necessary to develop an adequate environmental analysis of the Northern Great Plains region. The federal petitioners place little faith indeed in the work of the Northern Great Plains Resources Program when they make such a claim.

We strongly emphasize that an adequate regional environmental statement need not be nearly so long as the Eastern Powder River Statement. Instead of being encyclopedic, it would be far more helpful to both decision-makers and the public if the regional statement carefully analyzed the impacts of development and factors involved in the real, basic alternatives (see pp. 92-94 above). Thus, CEQ has recently issued a memorandum to federal agencies urging that they make "specific efforts to use the impact statement as a management tool, and to focus the statement on analyses of impacts of a proposal and its reasonable alternatives * * *." CEQ pointed out that "[t]he statement does not achieve this purpose when it has such prodigious bulk that * * * no one at the decision-making level in any agency will ever read it. * * * [I]ts purpose is to clarify, not obscure, issues and to forecast and analyze significant impacts of a proposal and its reasonable alternatives * * *." Russell W. Peterson, Chairman, CEQ, Memorandum for Heads of Agencies, February 10, 1976, pp. 2-3.



However, the Department is preparing such statements on five subregions of the Northern Great Plains region. We submit that this determination is clearly erroneous because it fails to carry out the purpose of NEPA to analyze all the environmental impacts, effects, and alternatives of the related federal actions.

We submit that the proper region for analysis in a comprehensive environmental statement is northeastern Wyoming, eastern Montana and the western Dakotas, the region described in the complaint (App. 11). This region was not arbitrarily determined by respondents. Instead, it is a geologic fact. The extent of the region is defined simply by the presence of coal—the Fort Union and Powder River coal formations. See map on page 103.

The coal area is, we submit, the appropriate region for analysis. The many energy-related activities, such as electric power plants or coal gasification plants, derive from the presence of the coal. The transportation components, be they railroads, or slurry or gas pipelines, or power transmission lines, are designed to transport coal or its products. The so-called secondary effects of such development—population growth and conversion of an agricultural region into an industrial complex with the concomitant radical alteration in the area's social and economic patterns—all will take place because the coal is there. This mineral resource therefore is both responsible for the activities and at the same time delimits the geographic area in which they will take place.

The federal petitioners themselves recognized this area as the proper one for study and analysis. Secretary of the Interior Morton, on June 30, 1972, stated that "[t]he vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environ-

mental protection" (App. 130). On July 18, 1972, Secretary Morton wrote Senator Mansfield that "[w]hat is needed * * * is a major comprehensive study * * * to arrive at a sound plan for regional development of the Montana, North Dakota, South Dakota and Wyoming areas associated with the Fort Union and Powder River Coal formations" (Ct. of Appeals App. 72). The Department of the Interior told the Senate Interior Committee in 1972 that it was developing "a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formation. The objective is the wise development of the region accomplished in full realization of social, economic and ecological consequences of alternative possibilities." Federal Leasing and Department Policies, Hearings before the Senate Interior Committee, 92d Cong., 2d Sess. 189 (1972). The Administrator of the Environmental Protection Agency wrote the Secretaries of the Interior and Agriculture concerning the need for a study of "the Fort Union coal region of Montana, North Dakota, South Dakota and Wyoming" in order to satisfy "the letter and spirit of the National Environmental Policy Act" (Fed. Pet. App. A, p. 37A, note 28). The Chairman of the Council on Environmental Quality sent the Secretary of the Interior a memorandum which stated that an environmental impact statement was needed "encompassing the regional and secondary impacts of coal development on Federal and Indian lands in the Northern Great Plains." Addendum A to Appellants' Reply Brief in the Court of Appeals, p. A-5.

The Northern Great Plains Resources Program was a major undertaking of numerous federal agencies, including the Bureaus of Reclamation, Mines, Land Management, Sport Fisheries and Wildlife, Indian Affairs and Outdoor Recreation; the National Park Service; the Forest Service; the U.S. Geological Survey; the Corps

of Engineers; the Atomic Energy Commission; the Departments of Labor, Commerce, Housing and Urban Development and Health, Education and Welfare; the Environmental Protection Agency; and agencies from the States of Montana, Wyoming, North Dakota, South Dakota and Nebraska (Ct. of Appeals App. 203-205, 216). It was created to "assess the potential social, economic and environmental impacts which would result from future development of the vast coal deposits and other resources * * * in five Northern Great Plains States—Montana, Wyoming, North Dakota, South Dakota and Nebraska. Memorandum of Secretary Morton (App. 130); Department of the Interior News Release (App. 132). However the Department of the Interior explained that the "focus will center on the study area, and particularly Powder River and Fort Union resources * * *" (App. 137). The study area in northeastern Wyoming, eastern Montana, and the Western Dakotas is shown in the map on page 103. As is readily apparent, the study area—which coincides with the region defined by respondents in their original complaint—simply follows the line of the coal deposits.

The federal petitioners argue (Fed. Br. 34-35) that the only basis for the conclusion of the court of appeals that respondents' definition of the region is appropriate was the "existence of the Northern Great Plains Resource Program." However, the region as defined in that Program of the federal petitioners themselves is obviously of great significance. In any event, petitioners ignore the physical fact of the existence of coal in a specific area and entirely reverse the logical order. The complaint and the NGPR Program defined this region because of the existence of that coal, rather than the other way around. Thus, the Department of the Interior, like respondents, concluded that northeastern Wyoming, eastern Montana, and the western Dakotas were the appropriate area for regional analysis because

of the contiguous coal formations which are located there.

Moreover, if the Northern Great Plains region is analyzed in five or more separate subregional environmental statements, the cumulative impact and effects of development cannot be adequately determined. The Eastern Powder River Statement principally focuses on only one and a half counties of northeastern Wyoming. We have seen above that the Yellowstone and Missouri Rivers drain the entire region. Thus, the consumption of water by various coal-related projects and the discharge of pollution by these projects is cumulative for the entire region. There is widespread concern in South Dakota that the construction of slurry pipelines in Wyoming using ground water from the Madison Formation which extends into the former State will affect water supplies there. Similarly, air pollution will readily cross the boundaries of the subregions which the Department of the Interior has defined. For example, the coal region in southeastern Montana, where several power plants and gasification plants are proposed, is directly north of the Powder River Basin. In addition, it is expected that many of the employees of the projects in southeastern Montana will live in northern Wyoming, which will add to the enormous population increases in that area. Nonetheless, the Powder River Environmental Statement, in considering the air pollution and population increases which will result from industrial development, considers only projects within the basin itself. See pp. I-461, I-554. Effects on climate will be cumulative for energy facilities throughout the region.

Several of the basic alternatives we have discussed above (pp. 76-77, 92-94) can also only be analyzed in a region-wide environmental statement. A subregional statement cannot consider whether strip mining and related energy-development should be concentrated in only a portion of the Northern Great Plains or whether strip

mining should be restricted to areas where the likelihood of reclamation is best. These alternatives can only be fairly considered by comparing the various subregions in an overall analysis. For example, even though the NGPR Program Report concluded that "[t]he poorest rehabilitation potential [in the entire Northern Great Plains is] recorded for Campbell County" (p. 53), one of the counties considered in the Eastern Powder River Statement, the statement did not look beyond that county's border to compare other coal areas of the Northern Great Plains or consider them as an alternative source of coal. Similarly, the allocation of water supplies, water pollution, or air pollution requires examination of these regional problems on the basis of the entire region.

In short, the Department of the Interior itself recognized in the Northern Great Plains Resources Program that comprehensive analysis of the effects of, and alternatives to, coal development in the Northern Great Plains must consider the entire region. We submit that this conclusion was clearly correct because subregional analysis of many effects and alternatives can clearly not be done. The Department's belated decision to divide the region into numerous subregions is inconsistent with its duty to carry out adequate environmental analysis under NEPA and is therefore invalid.

IV.

EVEN IF THE DEPARTMENT OF THE INTERIOR'S DECISION TO DO ENVIRONMENTAL STATEMENTS ON SUBREGIONS OF THE NORTHERN GREAT PLAINS COMPLIES WITH NEPA, FURTHER FEDERAL ACTION MAY NOT BE TAKEN WITHOUT PREPARATION OF ADEQUATE SUBREGIONAL STATEMENTS

We have contended above that the proper scope for a regional environmental impact statement, as the Department of the Interior and other federal agencies so

repeatedly recognized, is the entire Northern Great Plains. If this contention is upheld by this Court, it follows that their regional environmental impact statement must be prepared prior to further federal actions being taken.

Even if, however, this Court determines that the Department of the Interior can satisfy the requirements of NEPA that a comprehensive environmental statement be prepared on coal development in the Northern Great Plains through subregional statements, further federal actions may not be taken until adequate subregional statements have been prepared. The Department of the Interior has only prepared a subregional statement as to the Eastern Powder River Basin. While it is beginning to do other statements, further federal actions cannot be taken in those areas until those statements are completed.

The Department of the Interior recognizes that further actions cannot be taken in areas outside the Eastern Powder River Basin until the appropriate subregional statements are completed. Secretary Kleppe's announcement of the new coal leasing policy specifies that further leasing will be preceded by appropriate analysis (AEP Br. App. 8a, 11a):

When a leasing action is considered, we will undertake a thorough analysis to determine the effects of the proposed action on the environment. In accordance with the National Environmental Policy Act, when the proposed action is determined to be a major Federal action, an environmental impact statement will be prepared before any specific lease or group of leases is offered.

. . . .

In areas where a regional environmental impact statement is warranted, if an individual action meets the short-term criteria, and where approval is

required before completion of the regional statement, an environmental assessment will be made. *If, as a result of the assessment, the proposed action is determined to be major in scope, approval of that action will be withheld pending completion of the regional environmental impact statement.* (emphasis added)

In addition, we submit that the Eastern Powder River Environmental Statement, even if deemed adequate as to its scope, does not satisfy the requirements of Section 102(2)(C) of NEPA. That statement barely mentions, or does not discuss at all, the basic alternatives concerning coal development which we have discussed (pp. 92-94 above). As just one example: even though the statement focuses principally on four strip mines and a railroad, it dismisses the alternative of a slurry pipeline instead of the railroad in just over one page, and without any analysis which could possibly allow the decision-maker to choose which alternative was environmentally preferable. Eastern Powder River Statement, pp. I-697 to I-698.

However, the adequacy of the Eastern Powder River Statement is not before this Court. Since neither the draft nor final statements had been issued when the complaint was filed or the district court made its decision, the statement was not, and could not have been, considered in that court. When the federal petitioners lodged the draft statement in the court of appeals, the court asked the federal petitioners to explain its significance to the litigation. Letter of Robert A. Bonner, Chief Deputy Clerk to Edmund B. Clark, Department of Justice, September 13, 1974. The government replied (Supplemental Memorandum of the Federal Appellees, September 27, 1974):

We call the Court's attention only to the existence of these draft impact statements. Because the con-

tents of the statements are not relevant, there is nothing missing from the statements that could be relevant in any respect to this case.

As a result, the court of appeals merely concluded that, as to the Eastern Powder River Statement and two environmental statements on individual mining plans, "[t]here has been no contention that any of these individual statements comprehensively study the regional impact of coal development in the Northern Great Plains, and our examination of the statements makes it clear that they do not do so." Fed. Pet. App. A, p. 11A, note 15. Thus, the court concluded only that the Eastern Powder River Statement was inadequate to constitute a regional statement for the entire Northern Great Plains; no argument was made or consideration given as to whether it was adequate if the proper scope of a regional statement was only a small section of the broader region.

It would of course be inappropriate to litigate the adequacy of a lengthy, complex environmental impact statement for the first time in this Court. We therefore submit that the issue should either be remanded to the district court or simply left for respondents to litigate in a separate suit.⁹⁸

⁹⁸ The petitioners raise some question of respondents' standing. Fed. Br. 10, note 15; AEP Br. 5, note 1. Neither the district court nor the court of appeals found that any of the respondents lacked standing to bring this litigation. The court of appeals, however, indicated that proof of standing was required, where controverted by the defendants, and that only the respondent Northern Plains Resource Council submitted such proof in the form of affidavits (Fed. Pet. App. A, 20A, note 20).

The suit was brought by seven national and state organizations on behalf of themselves and their members. The complaint alleged that members of the organizations, who are residents and land owners in the Northern Great Plains region, would suffer a variety of harms from improper coal development (App. 9). Those who are ranchers and farmers are threatened by destruction of land, diversion of water, pollution of ground and surface water, and harm to animals, crops, and vegetation from the inevitable increase in air

pollution. Those engaged in the recreational industry are threatened by the loss of habitat for wildlife, by the harm to wildlife from air and water pollution, by destruction of open lands, by harm to fish through diversion or pollution of water, and by vastly increased population. All residents of the area or visitors to it are threatened by being forced to breathe polluted air, by loss of recreational opportunities, and by esthetic damage from constructing power plants, transmission lines, railroads, highways, and new or enlarged towns and cities. The answers of defendants merely denied the complaint's allegations with flat, conclusory statements.

The only party which stated any basis for a denial of standing or raised it in litigating the cross-motions for summary judgment was intervenor Westmoreland Resources in its Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Judgment. In response to Westmoreland's claim that none of the plaintiffs had shown standing as to Westmoreland's particular mine, the affidavits of the Northern Plains Resource Council were filed and found sufficient by the district court. The district court found, in accordance with the allegations of the complaint, that members of the plaintiff organizations "live, work, engage in recreational activities, own land and hold surface rights on or immediately adjacent to the sites of coal mining and related activities in the four-state area * * *" (Fed. Pet. App. A, p. 86a).

Respondents submit that the allegations contained in their complaint fully satisfied the test for standing stated by this Court in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) "that a party seeking review must *allege* facts showing that he is himself adversely affected * * *" (emphasis added). Moreover, this question is fully answered by this Court's statement in *United States v. SCRAP*, 412 U.S. 669, 688-689 (1973): "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action * * *. If, as the [appellants] now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact." Thus, even as against a motion to dismiss on the ground of standing, the allegations of the complaint were enough, so long as they stated a "specific and perceptible harm." *Id.* at 689-690. Since respondents herein responded to the only challenge raised by a motion for summary judgment, the requirements set forth by this Court have been met.

If, however, this Court requires proof of standing, in addition to a well-pleaded complaint, even though the defendants have not challenged the factual basis of the allegations, the court of appeals properly held that sufficient proof had been introduced as to the Northern Plains Resource Council (Fed. Pet. App. A, 21A, note 20). As to the other plaintiffs, if further proof of standing were deemed

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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April 1976

to be required, then respondents ask that this issue be remanded to the district court where respondents could provide ample evidence of the direct harm these members would suffer as a result of the federal petitioners' actions. Cf. *Sierra Club v. Morton*, *supra*, 405 U.S. at 735, note 8.

APPENDICES

APPENDIX A**TESTIMONY OF THE HONORABLE THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON MINERALS, MATERIALS AND FUELS, SENATE INTERIOR COMMITTEE, FEBRUARY 16, 1976**

I appreciate the opportunity to appear before the Subcommittee on Minerals, Materials and Fuels to discuss the Department's new coal leasing policy and to respond to the issues which the Chairman raised in his letter of January 28.

Since we have furnished the Committee with copies of our Statement on New Coal Leasing Policy which we issued on January 26, I will not restate the background which brought us to the new coal leasing policy. However, I would like to briefly reiterate the components of that policy before we comment on specific matters raised by the Subcommittee:

The new policy is designed to:

- create a balance between the need for coal and the need to protect the environment
- assure a fair market return to the taxpayer for the sale of this public resource
- assure that we lease only that coal which is needed by the Nation and only when it is needed
- assure the leasing of that coal whose value exceeds the total cost of production, including environmental costs
- eliminate excessive lease holdings
- assure public participation in the Federal coal leasing process

We believe that the policy we have announced will accomplish all these goals and provide a rational and sound basis on which leasing decisions can be made. The new policy combines a number of features which must be viewed together.

A. EMARS.

The first feature of the policy is implementation of a coal leasing process, called the Energy Minerals Activity Recommendation System or EMARS. Its purpose is to tell us where, when, and under what conditions coal should be offered to meet national needs so we can consider whether and how it should be offered for lease. There are four basic steps in the EMARS process:

- 1) land-use planning
- 2) nomination of coal tracts for lease
- 3) environmental analysis, and
- 4) coal resource evaluation

The Bureau of Land Management is preparing land-use plans, called Management Framework Plans, which will identify and inventory not only the minerals, but other values as well, including agriculture, grazing, wildlife, recreation and water resources.

After completion of the Management Framework Plans, the next step is nominations of tracts of land for leasing. Periodically industry, the States and the public at large will be called on to identify tracts either as appropriate for leasing or as inappropriate for environmental or other reasons. A comparison of the information obtained through the nomination system and the basic data contained in the Management Framework Plans will serve as the basis for initially judging what areas, if any, should be considered for lease.

If that initial judgment is to lease a particular area, a thorough analysis will be undertaken to determine the effects of the proposed action on the environment. If the action is determined to be a major action significantly affecting the quality of the human environment, an environmental impact statement will be prepared pursuant to the National Environmental Policy Act before any lease or group of leases is offered.

In some cases, mining coal from one or more leases might have substantially broader significance than the direct impact of the particular lease operations and may set the course of development for geographic areas encompassing both Federal and non-Federal lands. In such instances, as determined by the Secretary, the Interior Department will prepare a regional environmental impact statement before deciding to proceed. The region covered will be determined by basin boundaries, drainage areas, economic interdependence, and other relevant factors.

The final step in the EMARS lease process is the calculation of the economic value of the individual coal deposits which are being considered for lease. The Geological Survey has developed improved methods for valuing coal and they will be utilized in the EMARS system. The purpose of the valuation is two-fold: first, to ascertain whether the value of the coal itself is sufficient to warrant the environmental risks of actual mining and second, to determine the adequacy of the bids.

These four elements of EMARS will give us the basis for a reasoned judgment about whether any proposed leasing is in the public interest. One additional factor will, however, play a critical role and that is the marketplace itself, for the market will ultimately decide whether any leasing will occur.

Under this new coal lease policy, new leasing of Federal coal will be made under a competitive lease system.

However, existing preference right lease applications will be processed in a timely fashion, giving priority to those proposed leases which meet the short-term criteria.

B. Regulations for mining operations and reclamation.

Perhaps the second most important element of our new coal lease policy involves new regulations governing both mine operations and mined land reclamation on Federal coal lands.

I am firmly committed to meeting our Nation's energy needs by using the full array of alternatives reasonably available to us—both to increase supplies and to encourage conservation. But I am also determined that we cannot sacrifice our important environmental protection goals. With respect to coal on Federal lands, this means we must have a strong program of mine operation and reclamation. Developing effective regulations to protect land and environmental values without arbitrary or unworkable limitations is one of my highest priorities.

The proposed regulations most recently available for general public comment were published by the Department on September 5, 1975. They sought to accommodate legitimate concerns for adequate environmental protection while meeting expanded coal needs. We have now received more than 100 comments, totalling more than 1,000 pages of detailed and constructive review of our regulations.

The Department is preparing an environmental impact statement on these regulations pursuant to the National Environmental Policy Act. Since my decisions concerning these regulations will be based in part on the Statement, I am not in a position to resolve any of the issues concerning them at this time.

I would, however, like to discuss some of the issues you have previously raised with the Department, mention briefly recommendations that have been made to me which address these issues, and note some of the alternatives that have been presented for my consideration.

First, concern has been expressed that specific language contained in earlier proposed regulations was deleted from the draft published in September. The Task Force which has been reviewing the proposed regulations has endeavored to retain all of the substantive elements of earlier drafts. There has been some elimination of duplication, and some clarification of language, but we intend to retain the essential elements.

Second, it has been suggested that the regulations fail to place a burden of proof of reclamation capability upon the operator, or to require written findings with respect thereto by the Department that the capability exists with the operator. In issuing a lease or approving a mining plan, the test set forth in the proposed regulations is that such actions may take place only when the reclamation required by the regulations is "attainable and assured." The burden of establishing that fact is clearly upon the operator, for without such facts the administrative jurisdiction of the appropriate officers of the Department would not exist. To insure that this is the case, the recommendations now proposed for my consideration include two additional measures.

At the request of any person having an interest which might be adversely affected, a public hearing would be held for any of four categories of actions: issuance of a lease, the approval of a mining plan, the release of a bond, and the final abandonment of operations. In addition, with respect to all major decisions and determinations by Departmental officers, the regulations would require that written findings be made to which the public

would have access. These findings could include not only the action taken, but the factual basis and the rationale for that decision. This requirement would not apply to each day-to-day individual action of the officers involved, but we would expect that it will form the basis for effective public participation in the regulatory processes. Public participation is vital in large part because of the nature of the mechanisms that have been set forth to adopt and enforce the actual requirements that will apply to each operation.

In any enforcement program, appropriate flexibility is necessary. Within limits, we need to recognize that each mine is different, and specific environmental protection requirements may vary significantly even within a given geographical area. Review of the environmental impact statement indicates to Interior that there are basically two possible ways of providing needed flexibility. On the one hand, it has been recommended that the Department set forth very precise, detailed performance standards but allow for the granting of variances from these standards based upon individual circumstances. On the other hand, the proposal that was published in September allowed for somewhat greater flexibility in the performance standards themselves, but envisioned application of the standards to each operation on an *ad hoc* basis at the time a mine plan is approved.

The current draft regulations follow the original proposal. The language has been modified in several respects. The definition of "maximum extent practicable" has been tightened, and a separate procedural mechanism has been created to insure that qualification of standards by this language does not result in abuse.

Applicability of state laws is yet another difficult issue requiring resolution. Departmental representatives have been conferring at length with representatives of the states in which Federal coal is a major potential energy

resource. I share the concerns that they have expressed and fully recognize the legitimacy of each state's interest in preventing environmentally destructive mining practices. On the other hand, I also recognize that Federal coal is a national and not just a state resource. In administering this national resource, it would be a denial of my duties as Secretary to turn over the ultimate question of whether coal may be produced to any other authority.

Moreover, a considerable amount of Federal coal is adjacent to private lands. It is obviously in the best interests of all concerned if such coal is developed in a coordinated manner. To the extent possible, the same or similar restrictions should apply and any economies of scale that might arise from reducing overlapping jurisdiction should be pursued at both the Federal and state level.

With these concerns in mind, the current draft regulations would allow me to review state laws and, in a rule-making proceeding, determine that in those states afforded more stringent environmental protection than Federal regulations, the appropriate State laws will be applied with respect to Federal coal so long as State law does not obstruct development of the Federal resource. Mining Supervisors would include the terms of the state laws involved as a condition of their approval of a mine plan. I am informed that this language is acceptable to the affected Western States and reflects appropriately their concerns.

Mr. Chairman, the proposed regulations are complex, and the alternatives to the recommendations of which I have been presented are many. This brief outline is intended only to address some of those areas of particular concern that you or your staff have identified. The proposed regulations which I am currently reviewing make

many more changes. I am sure you will agree with many of them. We would require, for instance, much broader notification to the public, through the *Federal Register* and elsewhere, of major pending decisions about to be taken. We have expressly provided for recognition of State law. The period of liability under a revegetation bond may be extended under the proposed regulations for an additional five years, and reclamation of affected lands as contemporaneously as practicable with ongoing operations is more clearly provided.

An important question that I will be asking myself as I review these regulations, Mr. Chairman, is will these regulations be effective in implementing stringent environmental protection standards. As I review the recommendations, I intend to make sure that these regulations are tough, that they are enforceable, and that they have the necessary flexibility to get the job done. Moreover, they should insure that the job will be done in full view of all interested parties.

C. Diligent development.

There are at present some 16 billion tons of Federal coal under lease, most of which had been leased prior to Secretary Morton's 1971 leasing moratorium. Although this might appear enough to meet demand for years to come, in reality, we do not know whether the coal leased prior to the moratorium is sufficient, or how much of that coal is suitable for actual mining. We do know that a substantial portion of that leased coal is not suitable for mining due to environmental and economic conditions. In order to more accurately determine the fate of this leased coal and to eliminate excessive lease holdings, we have promulgated standards which will require diligent development—or relinquishment—of new or existing coal leases. Under these new standards, a lessee must have mined at least one fortieth, or 2½%, of the

reserves of his lease within the first ten years of the lease. Moreover, he must pay advance royalties beginning in the sixth year of the lease, based on a production schedule that would exhaust the lease reserves in forty years. In addition, the royalty rates have been increased. The normal rate will be eight percent of the value of the coal at the mine-mouth. This rate may be varied, up or down, for good cause in particular circumstances, but in no case will the royalty rate be less than five percent.

In response to the Chairman's concern, we are aware that the Mineral Leasing Act of 1920 provides that advance royalty payment may be made in lieu of continuous operation of the mine. However, the requirement that one-fourtieth of the lease be mined by the end of the tenth year will necessitate a substantial commitment of capital by the lessee. This required initial commitment of equipment and manpower, coupled with the substantial advance royalty payment, will be a sufficient economic incentive to encourage diligence, regardless of the continuous operations requirements.

The effect of these new requirements will be to assure that the coal most likely to be produced will be developed in a timely fashion and that coal under lease which is not readily producible will be returned to the Federal estate.

D. Preference right leases—commercial quantities

In addition to the Federal coal already under lease, there are some 192 preference right lease applications pending which must be acted upon. They involve an estimated 10 billion tons of coal.

For some time, the Department has felt the need to provide a more realistic basis on which to accept or reject preference right lease applications. Heretofore the

definition of "commercial quantities" applied under the Mineral Leasing Act was simply whether the coal existed in the proposed lease area and whether it was suitable for mining under current technology.

In undertaking the development of a new coal mine, any prudent businessman would consider the costs of actual mining, of transporting his coal to market, and the cost of meeting the environmental protection requirements. These cost considerations would have to be weighed against the value of the coal itself. Therefore we have published a proposed new definition of the term "commercial quantity" which more clearly defines those factors which any prudent businessman would consider. With the final promulgation of this new definition, we will be able to determine which preference right lease application now pending must be granted or should not be granted based on practical or prudent business criteria.

The Subcommittee has raised the question of the relationship of a preference right leasing system prescribed in the Mineral Leasing Act and the provisions of the National Environmental Policy Act. Section 101 of NEPA requires that the Federal Government interpret and administer public laws of the United States "to the fullest extent possible" in accordance with the policies of that Act. In the opinion of our Solicitor, NEPA is not sufficient to deny an application for a lease under the preference right leasing system of the Mineral Leasing Act, if that applicant has met the test of "valuable deposit" and "commercial quantity" as prescribed by the statute. I am submitting a copy of the Solicitor's opinion on this subject for the Subcommittee's review.

E. Indian lands.

As a part of our new policy, we have established procedures for dealing with the coal leasing issue on Indian

lands. Briefly, I want to assure the Subcommittee and the tribes themselves that there will be no coal resource development on Indian lands without the full concurrence of the tribes. As trustees for the tribes, it is our responsibility to see that their desires with respect to coal development are met. Should a tribe decide to lease coal, it will be our responsibility to support that decision, providing it is determined to be in their best interests. The Department will therefore approve leasing on Indian lands where the tribal or Indian landowner wishes to dispose of the coal, where the terms and conditions of the lease are in the best interests of the Indian landowner, and where appropriate environmental safeguards have been imposed.

F. Interim policy—moratorium

These elements comprise the new coal policy. Until such time as the new system is fully in place and operational, we will continue to maintain a mechanism in which certain proposed leasing actions can be approved where they meet defined critical production needs. These so-called short-term criteria include the following terms and conditions:

- The proposed lease must be necessary for continuation of an ongoing mining operation, or
- The proposed lease must be necessary as a reserve against production in the near future, generally to fulfill production requirements within five years,
- In all cases, these special leasing actions will take place when conditions of NEPA have been met, and
- Limited leasing will be approved only when we are assured that the environment can be ade-

quately protected and the land can be adequately reclaimed.

Finally, with these actions, we feel there is no longer any need for continuation of the coal leasing moratorium imposed in 1971. The EMARS process, itself, once fully implemented, will tell us whether further leasing is necessary. The control points we have built into our leasing process, including Management Framework Plans, nominations, environmental analysis, resource valuation, competitive leasing, and diligent development, are all designed to assure that only coal which is necessary to the Nation will be leased. We are not in the business of leasing coal for speculation. We are in the business of seeing that these Federal coal resources are produced for the Nation's benefit.

G. Coal policy litigation

I would like to address the relationship of our coal lease policy to the suit now pending before the United States Supreme Court, *Sierra Club v. Kleppe*. The suit originally sought to enjoin further leasing actions and approval of coal mining plans within an area defined as the Northern Great Plains Region until such time as a Federal coal plan is devised for that region and an Environmental Impact Statement is prepared on that plan. As indicated earlier in this testimony, we intend, wherever necessary to complete regional Environmental Impact Statements, but of a different magnitude. The Northern Great Plains region, as the Subcommittee knows, encompasses portions of five States: Nebraska, Wyoming, North and South Dakota, and Montana. The regions we envision would have common basin boundaries, drainage areas, and economic interdependence. An example would be the region encompassed in the Eastern Powder River Environmental Impact Statement or another under preparation in Northwest Colorado.

But the real difference we have with the decision of the Circuit Court in the Sierra Club suit is not about a geographical issue, but a philosophical one. The suit would require that the Department prepare a development *plan* for coal in advance of leasing in the Northern Great Plains region. This would overly restrict the workings of the free market and implies a restructured role for the States. The Circuit Court opinion which the Government is appealing says, in effect, that the issuance of leases, rights-of-way, and other such actions evidence the Federal Government's control over development of natural and human resources in the region. We deny that we are controlling the development of resources in a region. Rather, we intend only prudent management of Federal coal resources. To assure otherwise is to advocate a new and perhaps dangerous role of Federal Government which denies any proper role for the market forces and for that matter, the States. We propose to involve the States in our process. We see no such role for the States in the system which the suit proposes. For this reason, we are hopeful that the Supreme Court will act favorably on our appeal.

I will be happy to answer any questions you might have.

APPENDIX B

EXECUTIVE SUMMARY AND
DECISION DOCUMENT

PROGRAM DECISION OPTION DOCUMENT

THE PROPOSED FEDERAL COAL LEASING PROGRAM

December 16, 1975
Bureau of Land Management

* Notations in brackets are handwritten in the original.

PROPOSED FEDERAL COAL LEASING PROGRAM

Decision Paper and Summary of PDOD

The Bureau of Land Management has prepared a Program Decision Option Document which presents a thorough discussion of the proposed new coal leasing program and its major alternatives. This decision paper presents a brief summary of the PDOD and requests a decision on adopting the proposed coal leasing program or some alternative to that program, a decision on the incorporation of regional EIS's into the leasing program, a decision on the processing of non-competitive applications, a decision on the policy of Departmental review of coal leasing actions and additional considerations concerning lifting of the current leasing moratorium and the role of the short-term leasing criteria in the new program.

VII. *Decision on EIS Procedures*

The coal programmatic EIS, since it is not site-specific, will not satisfy the requirements of NEPA for all coal leasing actions, though it may for some.

Alternative strategies for the preparation of EIS's range from simple case-by-case determinations of whether an EIS is required, to the setting of guidelines on what stage of the leasing process is normally the best time for an EIS. One alternative would be to decide upon a limited number of regions, each of which is likely to have reasonably homogeneous characteristics, and set the guideline that the next permit or lease action in the area would call for an EIS on coal development in the whole region. The intention here would be that the one statement, or addendums of it, could serve for most or all actions in the region for a period of several years.

The procedures of BLM and GS for taking action related to issuing preference right leases, holding competitive lease sales, approving mining plans and issuing prospecting permits require that environmental analysis be

made of the operation to be carried out as a result of the proposed action and, if the actions are likely to have impacts significantly affecting the quality of the human environment, EIS's are prepared prior to taking the proposed actions. Where several impact statements are found to be required in the same areas, area wide, or regional impact statements have been prepared, i.e., Eastern Powder River in Wyoming and Northwestern Colorado. Regional impact statements have advantages of cost since they allow the sharing of factors of analysis common to several statements like description of natural and socioeconomic conditions, and they allow the analysis of cumulative impacts in an area, such as the effects of several operations on community services in a town or several towns. Regional impact statements may have the disadvantage of requiring a longer time to complete than would any statement for a single action included in the regional statement, thereby, holding the initiation of that single action until the entire regional statement is completed—not an insignificant public cost when very important projects are involved. Also, not an inconsiderable cost to a company which is eager to initiate an operation, i.e., a coal mine necessary to supply fuel for a new power plant.

In formulating a new coal leasing policy, it is necessary to decide on a policy for designing and preparing environmental analyses and environmental impact statements. Three distinct options are apparent: (1) Continue the policies of BLM and GS to conduct environmental analyses prior to issuing preference right leases, offering leases for competitive sale or approving mining plans or issuing prospecting permits and, if significant impacts affecting the quality of the human environment are likely, require the preparation of an EIS before taking the proposed action (if several EIS's are to be prepared in an area, a regional EIS will be prepared); (2) require a site-specific EIS to be prepared before issuing

any lease, offering any tract for competitive sale, approving any mining plan or issuing any prospecting permit and, where several EIS's are required in an area, prepare a regional EIS; and (3) require a regional EIS before issuing any preference right lease, offering any tract for competitive sale, approving any mining plans or issuing any prospecting permit, in an area.

Alternative M. Continue BLM and GS Policy.

Under this option, environmental analyses would be prepared before each key coal program decision. If the analysis concludes that an EIS is necessary for full compliance with NEPA, it would be prepared. Regional EIS's could be prepared when several EIS's are required in the same area.

Although most coal actions would require EIS's, some may not because the environmental analysis in such cases would show that impacts which would significantly affect the quality of the human environment are not likely to occur. This option allows such cases to be recognized and avoids delay while EIS's are being prepared. The option also allows flexibility in regard to regional EIS's by allowing an action to be taken after a site-specific EIS or regional EIS, whichever is found appropriate. By this option, a very important action might proceed on the basis of a site-specific EIS rather than delay the action while a more time consuming regional EIS is prepared.

This option could subject the Department to criticism of environmental groups who might accuse the Department of adopting a policy designed to circumvent preparation of impact statements before key leasing or approval actions.

The program proposal in the final coal EIS states:

Whenever possible, several leases in the same region will be covered by a single environmental impact

statement rather than by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors. In all cases, each coal lease, prospecting permit, preference right lease application or mining plan will be analyzed to determine whether or not an EIS is warranted. An environmental analysis will be prepared prior to issuing any competitive or noncompetitive lease, prospecting permit or mining plan approval. If the analysis indicates an EIS is necessary, an EIS will be prepared unless a previous environmental impact statement has sufficiently analyzed the impacts.

Alternative N. Require a site-specific EIS to be prepared before taking any significant coal program action except that a regional EIS may be prepared when several site-specific EIS's are required in the same area.

This option would declare that all major coal actions have impacts that would significantly affect the quality of the human environment and, therefore, should not be taken until an EIS is prepared. Such a policy would find favor with environmental groups. It would allow very important actions to proceed after preparation of a site-specific EIS rather than a more time consuming regional EIS if such an action were found appropriate by the Department.

This option could mean that actions which ordinarily would not have impacts significantly affecting the quality of the human environment would be delayed while an EIS was prepared—an unnecessary cost to the government and the private operation in both funds and opportunities foregone.

Alternative O. Require a regional EIS before taking any significant coal program action.

This option would also declare that all major coal actions have impacts that would significantly affect the quality of the human environment and, therefore, would not be taken until an EIS is prepared. This option would provide the greatest assurance that, after a regional EIS is completed, coal actions in the area covered by the regional EIS could be taken without environmental challenge. BLM estimates that about 30 regional EIS's (including 9 in eastern states) would be required to cover all areas where significant coal leasing is likely. Each regional EIS would require 12-18 months for completion.

This option would eliminate any flexibility for the Department in being able to initiate important actions on the basis of site-specific EIS's; and, therefore, would build a longer processing time uniformly into all key coal decisions. It would require a large commitment of manpower for several years until the 30 regional EIS's are completed. Regional EIS's in some of the high priority areas could be initiated with existing resources, other areas would require significant additional funding for BLM and USGS from future budget actions.

Decision.

Adopt:

- _____ Alternative M. Continue BLM and GS policy
- _____ Alternative N. Require site-specific EIS's or regional EIS's, if appropriate
- [TSK] Alternative O. Require regional EIS's
[as modified]

January 27, 1976

REVISED ALTERNATIVE "O"

Where an EIS is required under NEPA for a particular Departmental action, whether that EIS will be a regional EIS or a site-specific EIS, will be determined according to the following principles:

- A. As a general proposition, and as determined by the Secretary, when action is proposed involving coal development such as issuing several coal leases or approving mining plans in the same region, such actions will be covered by a single EIS rather than by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors.
- B. In areas where the Secretary has determined that a regional EIS is to be prepared, if an individual action requires approval prior to completion of the regional EIS and, in the case of leasing activities, meets the short-term criteria, an environmental analysis will be completed. If the environmental analysis indicates that the individual action is such an integral part of the regional action that its environmental effects cannot be properly considered unless the regional EIS is completed, that action will be held until completion of the regional EIS.
- C. In all other cases, each coal lease or mining plan will be analyzed and an environmental analysis prepared to determine whether or not an EIS is required. If the environmental analysis indicates an EIS is necessary to comply with

NEPA, a site-specific EIS, or a regional EIS, if a series of proposed actions with interrelated impacts are involved, will be prepared unless a previous EIS has sufficiently analyzed the impacts of the proposed action(s).

No. 75-552

No. 75-561

Supreme Court, U. S.

FILED

FEB 26 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1975

THOMAS S. KLEPPE, SECRETARY OF THE
INTERIOR, *et al.*,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

AMERICAN ELECTRIC POWER SYSTEM, *et al.*,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMAX INC.

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Of Counsel

February 26, 1976

IN THE
Supreme Court of the United States
October Term, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMAX INC.

Amax Inc. became a party to this proceeding on November 7, 1975, following the Court of Appeals' decision and the expiration of time to file a petition for certiorari. (X 1)¹ Amax is therefore a respondent in this Court,

¹ Citations preceded by X are to pages of the appendix to this brief.

but supports the position of petitioners. Sup. Ct. R. 21 (4).

Although Amax believes that the Court of Appeals' decision should be reversed for the reasons set forth in the briefs of the federal and intervenor petitioners, there is a further ground for reversal insofar as the decision relates to Amax's Belle Ayr South coal mine. The mine is presently subject to the Court of Appeals' injunction as modified by the District Court on November 14, 1975, pursuant to a limited remand.

Amax leased the federal coal lands underlying the Belle Ayr South mine in September 1965. The company subsequently purchased the surface rights to this area, and began preliminary mining operations in late 1972 in accordance with a mining and reclamation plan approved by the Department of the Interior. Commercial deliveries of coal from Belle Ayr South commenced shortly thereafter, and the mine is currently producing coal at the rate of approximately eight million tons a year. (X 5, 8)²

This action was filed by respondents Sierra Club and others in June 1973. Amax was not named as a defendant, and no relief affecting Belle Ayr South or any other operating mine was sought during the first two and a third years of the case. Instead, respondents directed their attention at the approval of new coal leases by the Department of the Interior and the commencement of new mining operations pending a determination of whether the federal petitioners were acting pursuant to a plan or pro-

² Deliveries from Belle Ayr South are committed to public utility generating stations having an aggregate capacity of 11,400,000 kilowatts and comprising part of electric utility systems serving about 10 percent of the country's population. (X 6, 16, 18)

posal for the regional development of coal resources in the so-called Northern Great Plains Province.

On February 14, 1974, the District Court found that no such plan existed (F. 8, Pet. 75-552, App. D, 88A), and the Court of Appeals did not set aside that finding (Pet. 75-552, App. B, 39A). Moreover, the Court of Appeals was not prepared even in June 1975 to determine that a plan for regional development existed with sufficient definiteness to require the preparation of a regional environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act ("NEPA"). Indeed, the court expressly held that the suspension of long-term coal leasing by the federal appellees in February 1973, and the consequent "lack of definition" in government policy since then, pending publication of the Northern Great Plains Resources Program ("NGPRP"), precluded such a finding at that time (Pet. 75-552, App. B, 46A, n. 34).

Nevertheless, on October 9, 1975 respondent Sierra Club moved the Court of Appeals to modify its existing injunction to prohibit the Secretary of the Interior from approving a further mining and reclamation plan submitted by Amax to permit continued operation of the Belle Ayr South mine under the same lease issued by the Department in 1965. On November 7, 1975 the Court of Appeals remanded respondents' motion to the District Court for consideration and disposition in light of the Court of Appeals' decision of June 1975. (X 2) Seven days later the District Court issued an order modifying the Court of Appeals' injunction to prohibit Amax from operating for more than two years under the contested mining plan and restricting the scope of its mining operations during that period. (X 3-4)

Thus, although both courts below agree that no federal plan for regional coal development existed, or

could have existed, at the time Amax obtained its coal lease in 1965 or commenced mining operations at Belle Ayr South in 1972, nevertheless the mine is subject to injunction on the basis of an alleged plan which may come into existence in 1976 or later. As it relates to Belle Ayr South, the decision below therefore rests on the retroactive assimilation of an existing project into a program which, if it ever comes into being, will necessarily do so long after the project was commenced.

No case construing NEPA has gone this far, and no such conclusion is warranted by either the language or purpose of the Act. Such a construction of the statute would mean that whenever a plan for major federal action were proposed, any previously operating projects of a kind with the subject of the plan could be enjoined from continued operation until environmental litigation surrounding the new proposal were finally resolved. The harm and dislocation emanating from such an anomalous conclusion is obvious, and should just as obviously be avoided.

In failing to rule accordingly, the courts below not only misapplied NEPA but as well departed from this Court's teachings with respect to injunctive relief. Prohibitory injunctive relief against the executive branch, paralyzing the achievement of important national objectives, is a drastic remedy, and when plaintiffs sue solely to vindicate public policy, such relief should be granted, if at all, solely as a last resort and certainly only if "the traditional standards for extraordinary equitable relief" are met. *See Rondeau v. Mosinee Paper Co.*, 422 U.S. 49, 57 (1975). Respondent Sierra Club did not and cannot satisfy that burden as to the new projects that were the original subjects of this case, and, *a fortiori*, as to continued operation of Amax's Belle Ayr South mine, which is part of the existing environment and not of any "plan."

Conclusion

For the reasons stated herein and in the briefs of the federal and intervenor petitioners, the decision below should be reversed.

Respectfully submitted,

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February 26, 1976

APPENDIX

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Court of Appeals' Orders of November 7, 1975

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

Civil Action 1182-73

No. 74-1389

SIERRA CLUB, *et al.*,

Appellants,

v.

ROGERS C. B. MORTON, Secretary of the United States
Department of Interior, *et al.*

Before:

BAZELON, *Chief Judge*, WRIGHT and MACKINNON,
Circuit Judges

ORDER

The Clerk is directed to file the motion of Amax Inc.,
to intervene and to file response to the motion for expansion
of injunction, and on consideration thereto, it is

ORDERED by the Court that the aforesaid motion of Amax
Inc., is granted.

Per Curiam

For the Court:

HUGH E. KLINE,

Clerk

By: Robert A. Bonner

ROBERT A. BONNER

Chief Deputy Clerk

X2

Court of Appeals' Orders of November 7, 1975

ORDER

On consideration of appellants' motion to modify the temporary injunction filed January 3, 1975, and the cross-motions of the federal and intervening appellees to dissolve that injunction, it is

ORDERED by the Court that appellants' motion to modify the injunction is hereby remanded to the District Court for consideration and disposition. *See Sierra Club v. Morton*, — U.S.App.D.C. —, —, 514 F.2d 856, 883 (1975).

It is FURTHER ORDERED by the court that the cross-motions of the federal and intervening appellees to dissolve the injunction are hereby denied.

Per Curiam

For the Court

Hugh E. Kline

HUGH E. KLINE

Clerk

X3

District Court Order of November 14, 1975

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA
Civil Action No. 1182-73

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

ROGERS C. B. MORTON, *et al.*,

Defendants.

ORDER

This matter came before the Court pursuant to the Order of the Court of Appeals, dated November 7, 1975, remanding to this Court, for consideration and disposition, plaintiff-appellants' motion to modify the temporary injunction issued by the Court of Appeals on January 3, 1975, as well as on plaintiffs' motion for a temporary restraining order. In view of the Court of Appeals' existing injunction and it appearing to the Court from the pleadings and affidavits submitted by the parties that plaintiff-appellants' motion to modify the injunction should be granted to the extent indicated below, it is hereby

ORDERED:

(1) That, plaintiff-appellants' motion for a temporary restraining order is hereby denied;

District Court Order of November 14, 1975

(2) That, plaintiff-appellants' motion to modify the injunction of January 3, 1975, is hereby granted in that:

(a) The surface-mining operations of intervenor-defendant Amax Inc. are enjoined from continuing on federal lands, pursuant to the mining and reclamation plan for the Belle Ayr South mine approved by the federal defendants on November 11, 1975, for more than a period of two years commencing from the date of this order or until such time as a final decision on the merits of this case is rendered and it is otherwise decreed, subject to such terms and conditions as may be provided therein.

(b) During the period set forth in subparagraph (a) above, intervenor-defendant Amax Inc. may proceed with surface-mining operations at the Belle Ayr South mine pursuant to the federally approved mining and reclamation plan but is restrained from mining more than approximately 126 acres of land each year.

(c) The Secretary of the Interior is hereby enjoined from permitting surface-mining operations on federal coal lands pursuant to the mining and reclamation plan for the Belle Ayr South mine of Amax Inc., approved by the Secretary on November 11, 1975, beyond the period set forth in subparagraph (a) above.

So ORDERED.

November 14, 1975

Date

June L. Green

JUNE L. GREEN

United States District Judge

Affidavit of W. Hollie Hopper, October 29, 1975

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

No. 74-1389

SIERRA CLUB, *et al.*,

Appellants,

v.

ROGERS C. B. MORTON, *et al.*,

Appellees.

WASHINGTON
DISTRICT OF COLUMBIA } ss.:

W. HOLLIE HOPPER, being duly sworn, deposes and says:

1. I am President of the Amax Coal Company Division, and a Vice President of AMAX Inc. ("AMAX"). I am familiar with the company's mining activities in the State of Wyoming and particularly with AMAX's Belle Ayr South mine whose operations are the subject of a motion dated October 9, 1975 by appellants Sierra Club and others.

2. AMAX's Belle Ayr South mine is an active mining operation which has been making commercial deliveries of coal for approximately three years. The mine employs more than 100 people, and commenced activity in late 1972 pursuant to a mining and reclamation plan approved by the Department of the Interior. That plan, as amended,

Affidavit of W. Hollie Hopper

covers approximately 165 acres of Federal coal lands all of which form part of a 2,360 acre tract leased by AMAX from the Federal government. In January, 1974 AMAX filed a further mining and reclamation plan with the Department for the development of coal on the remainder of the leased area. If this Court directs that the Department withhold its approval of that plan, and AMAX is unable to obtain permission to continue its mining activities as previously planned, the company anticipates that it will be compelled to terminate the orderly development of the Belle Ayr South mine within five months. In that event AMAX will be unable to meet existing contractual commitments for the delivery of coal within four to five months thereafter, at which time all mining activities at Belle Ayr South would cease. Moreover, once orderly mining operations are disrupted, even if such disruption ends prior to a complete closure of the mine, the company will not be able to resume coal deliveries without sustained start-up delays which may approach nine months' duration.

3. At the present time AMAX has coal supply commitments from the Belle Ayr South mine running to tens of millions of tons for the period 1976 through 1978 alone. All of this coal is scheduled to be delivered to public utilities, in most cases pursuant to long term supply contracts entered into over the past several years. The affected generating stations of such utilities will possess a maximum aggregate generating capacity of approximately 11,400 Megawatts during the period, and the twelve utilities directly involved serve consumers in 20 different States with a service area population in excess of 17 million people. In addition other utilities will also be affected because of cooperative power

Affidavit of W. Hollie Hopper

generating programs and other regional power sharing activities.

5. Many of these utilities have advised AMAX that they will not be able to obtain alternative sources of coal if the Belle Ayr South mine is shut down, and that even if such sources were to become available, which is unlikely, they would not be able to make use of such coal under current environmental fuel restrictions and boiler design limitations without redesigning generating units already in service or under construction. Moreover, since the construction or adaptation of electrical generating facilities requires extended advance planning, any anticipated dislocation of fuel supplies in the future will necessitate immediate corrective measures, involving in some instances the complete redesign or abandonment of equipment. In the case of customers scheduled to receive coal deliveries in 1976 and early 1977, it is virtually certain that alternative sources of supply could not be identified, and necessary transportation arranged, in time to avoid serious disruptions of required service.

6. Since the commencement of operations at Belle Ayr South, AMAX has expended nearly \$30 million in capital investments in connection with its mining and reclamation activities. In addition, millions of dollars in equipment orders have also been committed to the project, and such commitment will become irrevocable unless the orders are cancelled within three months. As AMAX's mining program now stands, approximately 126 acres of land will be mined each year when Belle Ayr South production reaches 15 million tons annually and the mine will then employ approximately 260 people. The area mined will be subject

Affidavit of W. Hollie Hopper

to continuous and on-going reclamation and revegetation activities in accordance with plans submitted to the Interior Department. Moreover, because of the thickness of the coal deposits in the Belle Ayr region, the mine will be, despite its relatively small size, the largest coal mine in the United States in terms of production by 1976, producing millions of tons of low sulphur environmentally desirable fuel annually.

7. AMAX's mining and reclamation activities at Belle Ayr South have been a matter of public record for several years. While appellants have sought injunctive relief against the initiation of coal mines not yet in operation, they have not prior to October 9, 1975 sought such relief with regard to an operating mine. AMAX and its utility customers have entered into various contractual agreements in reliance on the Belle Ayr South mine's continued operation. AMAX was not named as a defendant in this case, and did not participate in the forming of the record in the District Court. In any event, there is no support in that record for appellants' assertion that the "Amax mining plan presents substantially the same situation as the four mines which are the subject of the Court's present injunction" and that the "harm to . . . Amax from delaying the opening of this mine until this case can be resolved is far outweighed by the environmental harm." Appellants' Motion to Modify Injunction, pp. 2 and 6. Unlike the four mines which are presently affected by this Court's order, AMAX's mine is not simply contemplated, but is currently in operation, has been making deliveries of coal for three years, and presently employs over 100 people, most of whom would have to be discharged within a matter of months if mining operations are disrupted. Nor is appel-

Affidavit of W. Hollie Hopper

lants' presentation of the potential environmental harm resulting from a failure of this Court to grant extended injunctive relief accurate. Although AMAX's mining plan covers approximately 2,200 acres of Federal coal lands, the orderly development of the mine and AMAX's attendant reclamation activities will permit expansion onto only a small fraction of that area during the likely course of this lawsuit. Appellants' request for extended injunctive relief will cause great harm to AMAX and the general public, and is both untimely and unnecessary to protect appellants' interest in preventing large scale development of the affected area prior to the final resolution of this case.

W. Hollie Hopper
W. HOLLIE HOPPER

Sworn to and subscribed before me this 29th day of October, 1975.

Ann H. Matthews
ANN H. MATTHEWS
Notary Public
My Commission Expires Dec. 14, 1977

Affidavit of Philip Sporn, October 28, 1975

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

No. 74-139

SIERRA CLUB, *et al.*,

Appellants,

v.

ROGERS C. B. MORTON, *et al.*,

Appellees.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, PHILIP SPORN, engineer and former utility executive, being duly sworn, depose and say:

1. a. I am a power system engineer who has practiced in that area of engineering in all its phases since I entered the field two years after graduation from the Columbia College of Engineering in 1917 with a degree in electrical engineering, and I have continued uninterruptedly doing that throughout the 56 years that have elapsed since then.

b. I am a licensed professional engineer in more than half a dozen states, being licensed to practice, and I have practiced, engineering in almost all branches involved in electric power generation, including mining, civil, mechanical, electrical, hydraulic, and nuclear engineering.

Affidavit of Philip Sporn

c. During the period 1920-71 I was in the service of American Electric Power Company (originally American Gas and Electric Company) in many engineering positions and was elected in later years vice president and chief engineer, subsequently executive vice president, and in 1947 president and chief executive officer of the company and all its subsidiaries; I served in this capacity for the next 15 years. It was during the period of my management that the company became the largest privately owned electric power system in the United States, second in size only to TVA. It also became and was recognized as the most progressive, technologically speaking, power system in the world.

d. Electric energy being a converted form of any primary energy such as coal, oil, gas, hydraulic power, or nuclear power, I specialized in advancing the art and technology of generation of electric energy from all these fuels and in a study of the technology of mining coal and applying it to the efficient production and efficient transmission of electric energy.

e. During the last 25 years, I have lectured (the last time in April 1975) on various aspects of energy at Columbia University, Massachusetts Institute of Technology, Cornell University, and Manhattan College. In three of these cases, I did this while holding the appointment of visiting professor. I have also written four books on various phases of electric power, the last of which was published in 1971 by The MIT Press. My latest book deals with the energy crisis and is in process of being published by Pergamon Press of England.

f. I have served the Government of the United States as an adviser to the Federal Power Commission and the Department of State, as consultant to the Joint Committee

Affidavit of Philip Sporn

on Atomic Energy of the Congress, as a member of the United States official delegation to the Geneva Conference on the Peaceful Uses of Atomic Energy in 1955, and since 1960 as a member of the General Technical Advisory Committee to the Office of Coal Research, which within the last year has become part of the Energy Research and Development Administration, dealing with the problems of coal mining, coal conversion to electricity, and coal conversion to synthetic gas and fuel oil.

2. I have given this synoptic summary of my professional work in energy in the hope that the Honorable Court will be able to get a better understanding of the source of my presumption to address it in this affidavit and because I deeply feel that we are now in an unprecedented energy crisis, the solution of which depends on how intelligently and determinedly we enroll to our side the two major indigenous fuels we possess and which nobody can deny us, which can give us energy independence. I refer to nuclear fuel and coal, which together can do so, but which either one alone cannot achieve. My affidavit, I hope, will help the Court to a slightly better understanding and to a proper solution to the problem placed before it.

3. a. The energy crisis which I have alluded to is one which threatens our national safety, economy, and way of living. This crisis is not the result of an overnight capricious action on the part of OPEC occasioned by the Yom Kippur War of 1973. It is, rather, the result of a long chain of misguided policies leading to wasteful use of oil and gas and reliance on cheap (for the moment) foreign oil, the detour to which was made as far back as 1945, rather than developing domestic supplies.

Affidavit of Philip Sporn

b. The economic problems and issues that this has raised are of the greatest. The Arab and other members of OPEC are fully aware of this. History may, indeed probably will, see the OPEC operation as a major, shrewdly conceived, attack on our way of living and an artful way to transfer into the hands of a small cabal the accumulated capital wealth of the industrially advanced Western world and of most of the smaller nations.

c. The common tie of the members of this cabal is that within their borders lie extensive deposits of oil, discovered and developed in the main by the United States and Great Britain, at great cost and with great technological skill. Within the last two years this oil, which the economy of the United States had grown increasingly to rely on for its needs, was shut off completely by an embargo. It is true that it was lifted after a relatively short period, but at a quintupling of price per barrel and there is no reason why this embargo cannot be imposed again. Only recently the price of this oil was increased by 10%. Unless we are prepared to meet another embargo, or, at best, merely other huge increases in price, it could cause an almost complete collapse of our highly advanced society, its national security, its industrial system, its style of living, its social-economic system.

d. A few striking figures: In 1974 the 17 oil producing nations involved in OPEC took in \$133 billion, virtually all of it from the sale of petroleum, according to data published by the International Monetary Fund on March 10, 1975. That was three times the total export sales of these 17 countries in 1973. It gave them a trade surplus of \$97 billion. By contrast the United States, Canada, Japan, and the industrial nations of Western Europe had a combined

Affidavit of Philip Sporn

1974 trade deficit of \$40 billion, four times that posted by these countries in 1973. For other industrial nations the trade deficit was \$27 billion. The poor, less developed, countries were in the red by \$26 billion. These deficits totaled \$93 billion and represent the counter figure to the \$97 billion surplus of the oil exporting countries.

4. Proposed solutions to this crisis have been outlined in a series of documents prepared by the Federal Energy Administration and by the Energy Research and Development Administration. In the main I agree with these solutions, except that I believe the actions they propose need to be sharpened and amplified. These consist of three important areas of action:

a. Reduction in rate of growth in energy consumption brought about by a system of conservation in every energy area: transportation, household, commercial and industrial use.

b. Substantial increases in new energy supplies mainly in the exploitation to a much greater extent of our two indigenous fuels, coal and nuclear. Coal needs to be expanded from the presently roughly 600 million tons per year to 1,500 million tons per year in the year 2000. Nuclear power needs to be expanded to about the same level, that is the equivalent of 1,500 million tons of bituminous coal per year. These two fuels will then account for over 50% of our total energy in the year 2000.

c. A very important item in this connection and bearing on the subject of this affidavit is the fact that this means heavy expansion of the percentage

Affidavit of Philip Sporn

of our total energy that will be used in the electric form, since neither coal nor nuclear fuel can be used conveniently, if at all, in any other form than the electric. Thus, the electric portion of the total energy will have to be expanded from the present 27% to 50%.

d. The balance of our energy will be provided by domestic oil and domestic gas, including a small component of synthetic oil, and by a small component of imported gas.

5. Unfortunately things are not going too well in our efforts to expand the use of nuclear fuel or to expand the use of coal. Nuclear fuel has run into a great many difficulties that have been encountered by the electric utility industry in its efforts to expand its nuclear generation due to the increased costs of construction, brought about by inflation, by immoderate intervention, by technological developments, and by a considerable worsening in their financial condition that made it difficult, if not impossible, to raise the capital needed. While some of these factors apply also to the building of power plants using coal, this is tragic in a sense because one of the problems that has been confronting us is the difficulty of getting additional supplies of coal. And yet more coal, if made available, can probably be absorbed by the energy economy more easily than any other fuel to relieve the OPEC pressure on us.

Coal use in general has not increased very much in the United States in the last two years of this great crisis. The total coal mined in 1974 was practically equal to that mined in 1973 and the coal mined in the first nine and a half months of 1975 was only 0.7% above the coal mined in 1974 for the corresponding period.

Affidavit of Philip Sporn

And so, we are not only not moving along the proper route to resolve the energy crisis, but we are running a grave danger that we will get an electrical energy crisis due to lack of nuclear capacity and to lack of coal generated capacity brought about primarily by inability to get coal. This is the heart of the matter that is before the Honorable Court. Surely a double headed crisis of vast proportions would be created or aggravated if this Court were to direct the Department of the Interior to withhold its approval of the present proposed mining plan of Amax on its Belle Ayr South Mine Project, a going concern whose closure is presently being sought.

6. I have carefully read some thirteen affidavits that are being submitted to this Honorable Court, one of them by W. Hollie Hopper of Amax, Inc., and twelve others by various executive officers of power companies, cities, or cooperatives. I am enormously impressed by the large amount of work that must have been expended to date in planning the generating facilities involving large additions to power systems serving 6,713,000 customers (therefore a total population estimated by me in excess of 20 million people), all of which would be adversely affected in the electric service they would be able to receive, or rather not receive, if the tens of millions of tons of coal that are at issue for the period 1976 through 1978 were interfered with so that their uninterrupted production did not become available to power the more than 10 million kilowatts of generating capacity that will normally be made operative by this fuel.

Not only is the production of the coal in itself an enormous economic operation but every generating unit of the score and more that are involved in totality represents a

Affidavit of Philip Sporn

complex project in itself: it involved a large amount of time before the coal for it was found—not easy to do these days—studied, and a decision reached to make a commitment for it with assurance that it would meet environmental standards; it was followed by engineering studies and specifications prepared for the purchase of boilers to satisfactorily burn this coal; the specifications then led to requests for bids, receipt of bids, analysis of proposals, and eventual purchase of boilers, turbines, and a host of other equipment; and all this in turn was followed by initiation of construction. This is the situation that eleven of the twelve electric power organizations, whose affidavits I have read, find themselves in.

The collective man years of effort involved in this are almost incalculable and all of it would be put into jeopardy of complete uselessness if the orderly procedure for the production and eventual shipment of the proper coal in each case was interrupted.

7. Fuel, in this case coal, is both the nucleus and foundation for an electric energy generating project. We badly need the continued construction and placing into service of the more than 10 million kilowatts of generating capacity involved here both to supply the electric energy uninterruptedly to some 10% of the population of the United States but also to make possible the satisfaction by electric energy of needs that would only a few years ago have been supplied by oil and gas, the supply of which is now in crisis.

8. Any blocking operation that puts a halt to the continued development of this vitality needed coal to supply an indispensable block of electric energy generation would

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Affidavit of Philip Sporn

not only involve great economic losses but I believe would create major social-economic damage and confusions, affecting perhaps 20 million of our people. I therefore strongly urge the Honorable Court to clear the way for the continued operation and development of the Amax Belle Ayr mine and the more than 10 million kilowatts of electric generating capacity which it will vitalize and bring into being.

PHILIP SPORN

Sworn to and subscribed before me
this 28th day of October, 1975.

Warren J. Fenimore
Notary Public

WARREN J. FENIMORE
Notary Public, State of New York
Residing in Kings County
Kings Co. Clk's No. 24-4604916
Certificate Filed in
New York Co. Clk's
Commission Expires March 30, 1976

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**Reply Affidavit of W. Hollie Hopper,
November 5, 1975**

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

No. 74-1389

SIERRA CLUB, *et al.*,

Appellants,

against

ROGERS C. B. MORTON, *et al.*,

Appellees.

WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

W. HOLLIE HOPPER, being duly sworn, deposes and says:

1. I am President of the Amax Coal Company Division and a Vice President of AMAX Inc. ("AMAX"). I submit this affidavit in reply to appellants' memorandum dated November 3, 1975.

2. Appellants state in their memorandum that AMAX is at liberty to continue its mining activities at Belle Ayr South by proceeding onto privately owned coal lands, and urge this Court to enjoin the orderly development of the Belle Ayr South mine on federal land as proposed in AMAX's current mining and reclamation plan. In the alternative, appellants suggest that the Court permit AMAX to continue its mining operations as presently planned during the next two years, but enjoin approval of any

Reply Affidavit of W. Hollie Hopper

subsequent development of the mine pending final resolution of this lawsuit. Although AMAX owns approximately 1,120 acres of fee coal in the Belle Ayr South region, the narrow boundaries of the fee area will not permit the separate development of the coal reserves it contains. The private coal land can be mined and reclaimed on a sound engineering and economic basis only in conjunction with the mining of federal coal, and no mining plan exists, or has ever existed, for the independent development of the fee reserves. Furthermore, the dislocation of present mining operations and the attempt to redirect the course of the Belle Ayr mine exclusively onto private lands is environmentally unsound. As stated in the final Environmental Impact Statement ("EIS") published by the Department of the Interior, any such course would delay and "complicate reclamation plans for the entire mine." EIS, p. 8. The precipitate action urged by appellants is not only impractical from a mining standpoint, but would render useless years of planning and reclamation activity by AMAX.

3. Appellants' alternative suggestion that this Court permit the continuation of AMAX's present mining operations during the next two years, but enjoin approval of any subsequent development of the mine pending final resolution of the lawsuit, is equally without merit. Although appellants allege that AMAX has exaggerated the effect of a closure of the Belle Ayr mine on electrical energy consumers across the nation, they do not dispute that the impact on many utilities will be both severe and immediate.*

* AMAX has never contended that 10% of the United States' population relies exclusively on coal from the Belle Ayr mine for electric energy, as appellants claim in their memorandum. (p. 2, n. 3) It is true, however, that approximately this percentage of the population may be seriously affected if AMAX's utility customers are forced to curtail electric service because of a closure of the Belle Ayr South mine.

Reply Affidavit of W. Hollie Hopper

Nor do appellants deny that under AMAX's existing mining plan only a small area of federal coal land will be disturbed during the pendency of this lawsuit. Appellants have thus conceded that no proper basis exists for injunctive relief against present operations at the Belle Ayr mine. The alternative suggestion that this Court now issue an injunction relating to future mining activity which will not commence for two years is wholly unnecessary and would serve no environmental or other purpose. If AMAX's present mining plan is approved by the Department of the Interior, and appellants subsequently prevail on the merits in this action, any relief to which appellants may be entitled with regard to the Belle Ayr mine can then be effectively awarded, including the revocation or modification of the mining plan presently at issue.

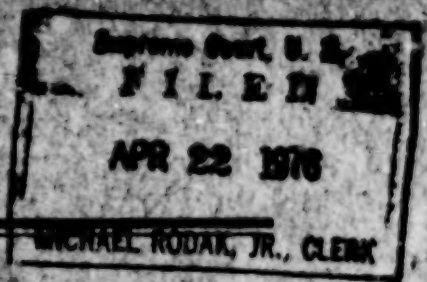
W. Hollie Hopper
W. HOLLIE HOPPER

Sworn to and subscribed to before me the 5th day of November, 1975.

Ann H. Matthews
ANN H. MATTHEWS
Notary Public

My Commission Expires Dec. 14, 1977

No. 75-552



In the Supreme Court of the United States
OCTOBER TERM, 1975

**THOMAS S. KLEPPE, SECRETARY OF THE
INTERIOR, ET AL., PETITIONERS**

v.

SIERRA CLUB, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

RAYMOND N. ZAGONE,

HERBERT PITTLE,

JACQUES B. GELIN,

Attorneys,

Department of Justice,

Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE
INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Although respondents' brief does devote six pages (pp. 48-50, 89-91) to a discussion of what we believe is dispositive in this case—the language and legislative history of NEPA—most of respondents' elaborate presentation discusses matters of only marginal pertinence. It is unnecessary, we believe, for courts to engage in the sort of environmental analysis that respondents present when, as here, there is no "recommendation or report on" a "proposal" for major

federal action with respect to respondents' region. We have discussed this at length in our opening brief and will not elaborate upon that subject here. Respondents' presentation seems to be an attempt to convert the relatively simple question whether an impact statement must be prepared prior to a recommendation or report on a proposal for major federal action into an examination of national environmental goals and needs that is neither required by NEPA nor appropriate for judicial resolution. It is with some reluctance, therefore, that we have prepared this lengthy reply brief. Many of respondents' arguments and assertions are irrelevant, but they are also inaccurate, and we believe that they should be corrected.

1. The "basic issue" in this case has never been "whether regional environmental statements must be done prior to federal actions concerning coal development in the Northern Great Plains" (Resp. Br. 40). The issue has always been whether the government must prepare one impact statement for the area chosen by respondents, which consists of portions of Montana, Wyoming and North and South Dakota. That was the question presented in our certiorari petition; that was the question decided by both courts below; and that was the question respondents sought to have decided (App. 11-26). Indeed, if the issue were the relatively abstract one whether regional impact statements should be prepared, we do not understand why respondents sought and the court of appeals granted an injunction preventing any further federal coal activity in the East-

ern Powder River Basin, which is in the Northern Great Plains and with respect to which a comprehensive "regional" impact statement has already been completed.¹

Respondents argue, however (*e.g.*, Resp. Br. 2, 26-28, 31-40), that the issue in this case has changed because the government's policy has changed. We disagree. The question for decision here still is whether NEPA *requires* the federal government to prepare an impact statement for the region of respondents' choosing, and that is not affected by the fact that the Department of the Interior voluntarily may prepare impact statements for groups of mines and regions larger than required by NEPA but smaller than that selected by respondents.²

¹ It is because respondents define a broader "region" as the appropriate one among the many possible choices that they characterize the six-volume Eastern Powder River impact statement as a "subregional" impact statement (Resp. Br. 109). But see *Eastern Powder River Basin Impact Statement*, Vol. I, Part I ("Regional Analysis"). The court of appeals described the Powder River statement as a "regional impact statement" for a "subregion" (Pet. App. 27A).

² Despite its lack of relevance, one misimpression left by respondents' brief in this regard deserves correction. In support of their statement that the Department of the Interior "plans to do four additional environmental statements on subportions of the Northern Great Plains region" (Resp. Br. 26), respondents cite (*id.* at 36-37) Program Decision Option Document, The Proposed Federal Coal Leasing Program 38 (Dec. 16, 1975). This document, which respondents have lodged with the Clerk, merely lists for the Secretary areas that the Department's Bureau of Land Management "believes could be important for Federal coal leasing and which *could* be included in regional EIS's" (*ibid.*) (emphasis added). It does not represent a "plan" by the Department or a decision by the

In any event, there has been no significant change in the federal government's policy. Secretary Morton's affidavit of October 26, 1973, stated that the Department of the Interior would prepare impact statements for appropriate groupings of mines, geologic structures, basins and individual actions (App. 124). The district court found (Pet. App. 94A-95A) that impact statements might be prepared for "smaller subregions, geologic structures, basin, or selected individual actions." The district court reiterated this finding on remand (Pet. App. 108A). Judge MacKinnon observed (Pet. App. 78A): "The Government's position has consistently been that an impact statement must be prepared * * * [and that] [w]here it finds that a statement covering related actions within an area is appropriate, a broader statement will be issued." The same position is taken in the *National Impact Statement* at page 1-5. We stated in our opening brief that appropriate regional impact statements will be prepared (Br. 8-9, 29, 37 n. 30, 47). Secretary Kleppe's affidavit of October 28, 1975, describes the Department's position fully (App. 189-196). And on January 26, 1976, the Department formally adopted the proposals contained in the *National Impact Statement* (Am. El. Br. 1a-14a). The position of the federal government has been consistent.³

Secretary; in fact, the Secretary has not decided to do four other impact statements covering large areas within respondents' region.

³ The Department's most recent statement of position is the testimony of Gregory Austin, Solicitor of the Department of

2. Respondents argue that an impact statement covering the portions of the four States they have designated is necessary in order to analyze various consequences of and alternatives to coal mining in this area (Resp. Br. 89-95). None of the subjects respondents suggest for consideration in an impact statement leads to the conclusion that NEPA requires such a statement for the particular region they have chosen. Moreover, the government already has analyzed many of these subjects.

For example, respondents first propose that the government compare the "availability, cost, environmental harm, and other factors of western and eastern coal" (Resp. Br. 92). If such a study were undertaken, it would appear appropriate to do so in the context of a nationwide review of coal mining on both federal and private lands, not (as respondents urge) in an impact statement covering selected portions of four of the western States that have coal deposits. Indeed, after the Department of the Interior circulated its draft of the *National Impact State-*

the Interior, before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs (*Oversight Hearing on Federal Coal Leasing Program*), 94th Cong., 2d Sess., on February 16, 1976. Mr. Austin stated (pp. 67-68 of typescript tr. for that day): "We have admitted that we think there ought to be regional planning, but as opposed to this Sierra Club case, the Northern Great Plains case, we are not talking about a region that simply blankets a five [sic] state area. * * * But we are talking about regions that are defined more by drainage areas, basin boundaries and economic independence."

ment, the Council on Environmental Quality commented in September 1974 as follows:⁴

The failure to discuss the role of eastern versus western coal is a serious deficiency. We appreciate the fact that this course was taken because the statement was intended to address only Federal coal leasing and that little Federal coal of consequence exists in the east. Yet Federal coal leasing decisions cannot be made in a vacuum. The economic availability of other coal supplies and the relative impacts of their development are critically related to *any* decision on Federal coal leasing. [Emphasis added.]

In response to CEQ's suggestion and the comments from other interested groups, including respondent Sierra Club,⁵ the final *National Impact Statement* added a section assessing "the development of non-Federal Eastern and Western coal reserves rather than leasing additional Federal coal lands." *National Impact Statement* 9-4; see *id.* at 8-20 - 8-32.⁶ Cf. *Eastern Powder River Basin Impact Statement* I-804 - I-805b (comparing mining in Appalachia and

⁴ *National Impact Statement* 9-24 (see our opening brief at 4, n. 1).

⁵ See *id.* at 9-88, where the Sierra Club states that the *National Impact Statement* should compare western, mid-western and eastern coal.

⁶ The *National Impact Statement* also considers the alternative of developing other sources of energy such as natural gas, oil and oil shale, nuclear power, solar energy, tidal and hydroelectric power and wind energy (pp. 8-3 - 8-25).

the economic impact there, as Sierra Club requested (*id.* at VII-700).

Respondents also suggest that the "regional" impact statement is needed to review "alternative technological methods for developing the coal resources" (Resp. Br. 94), to consider whether and how coal should be transported out of the region (*id.* at 93), and to analyze "soil conditions, rainfall, climate and other factors throughout the whole region" (*id.* at 92). But NEPA provides for an impact statement when there is "a recommendation or report on proposals for major Federal actions * * *"; none of respondents' suggested topics for analysis leads to the conclusion that NEPA requires an impact statement for their particular region.

It simply begs the question in this case to say, as respondents do, that only an impact statement for their region could analyze soil conditions in their region⁷ or consider the transportation of coal out

⁷ The *National Impact Statement*, at pp. 2-1 - 2-78, contains a description of the environment in the Western States, as well as other States that have coal deposits. The *Northern Great Plains Resources Program (NGPRP)*, at pp. 45-116 (see our main brief, at pp. 6-7) considers the climate, soil, vegetation, wildlife, water and so forth for the States of Wyoming, Montana, Nebraska and North and South Dakota. The *Eastern Powder River Basin Impact Statement* contains a detailed analysis of the climate, soil, vegetation, water resources and so forth for the portion of Wyoming in which the basin is located (pp. I-115 - I-398; see also, *e.g.*, Vol. V).

of their region⁸ or discuss the use of different means for extracting coal in their region.⁹ The same could be said of any part of the United States encircled by an arbitrary boundary. The fact that only an impact statement addressed to respondents' region can study expressly that "region" alone does nothing to show why NEPA requires that their region be the object of such scrutiny.¹⁰

⁸ Volume III of the *Eastern Powder River Basin Impact Statement* discusses generally the transportation of coal out of that area (pp. II-1 - II-165) (see also, e.g., *id.* at I-678, III-91, III-120, III-141, III-154, VI-57, VI-91, VI-113, VI-128); the *NGPRP* also discusses the transportation and exportation of coal (1-35 - 1-37, 1-45 - 1-51); the *National Impact Statement* discusses the potential markets for coal from various sections of the country and transportation factors (e.g., 1-72 - 1-83). See also Bureau of Mines Information Circular 8690, *Long-Distance Coal Transport: Unit Trains or Slurry Pipelines* (1975).

⁹ The *National Impact Statement* (e.g. at pp. 1-45 - 1-62, 3-26 - 3-27) discusses potential techniques for extracting coal. The *NGPRP*, at pp. 11-15, also discusses mining methods, as does the *Eastern Powder River Basin Impact Statement* (Vol. I, I-73 - I-78; see also Vols. II, III, IV).

¹⁰ (a). Respondents also state (Brief, at pp. 74-75) that one impact statement covering their "region" is needed because, as the court of appeals put it, "development of one mine is considerably more than an irretrievable commitment to that mine. In the case of water supply, it forecloses the possibility of another, environmentally preferable mine" (Pet. App. 38A, n. 28).

First, as a statement of fact, this is not supported by evidence in the record and it is not accurate. See our opening brief, at p. 37. Further, respondents' argument does not support their choice of the "region" that should be studied in one statement: the development of one mine in the "region"

they have chosen does not mean that all other mines in that region are foreclosed because of the water used by the first mine. If it did, there would only be one mine in the portions of the four States respondents have designated.

Second, to the extent respondents' argument suggests anything about the scope of an impact statement, it suggests that separate statements be prepared for each aquifer or basin (see note 3 *supra*) or that for each mine there be a separate statement considering the fact—if it is a fact—that such a mine would result in inadequate water for a mine located elsewhere. One thing respondents' argument does not suggest is a massive, single impact statement for their 90,000 square mile "region," which contains numerous underground formations and aquifers. See, e.g., *Eastern Powder River Basin Impact Statement*, Vol. I, at pp. I-195 - I-257.

(b). Respondents assert that an impact statement for the region they have chosen is needed in order to assess the consequences of a slurry pipeline for transporting coal (Br. 74-75, 93). But the federal government has not proposed a slurry pipeline; there is no federal report or recommendation on a proposal for major federal action on such a pipeline; all indications are that such a pipeline is purely speculative (see *Conservation Society of Southern Vermont v. Secretary of Transportation*, on remand, reprinted in our opening brief); the Sierra Club itself criticized the *Eastern Powder River Basin Impact Statement* (Vol. VI, at p. VII-941) for not devoting more discussion to slurry pipelines, which demonstrates that even respondents do not believe that such pipelines can only be analyzed in the context of an impact statement for their four-state region; and if respondents are dissatisfied with the discussion of slurry pipelines now contained in the Powder River statement they should direct a complaint to the adequacy of that statement, which they have not done. (While at one point respondents state that the discussion of slurry pipelines in the Powder River statement is too short (Br. 110), at another point they "strongly emphasize that an adequate regional environmental statement need not be nearly so long as the Eastern Powder River Statement" (*id.* at 102 n. 97).)

3. Respondents assert (Br. 62-65, 95-101) that the Council on Environmental Quality, which is within the Executive Office of the President, supports their position. That is not accurate. The *Sixth Annual Report of the Council on Environmental Quality* 641-643 (1975) describes this litigation without taking a formal position. Chairman Peterson of the Council testified (*Oversight Hearing on Federal Coal Leasing Program, supra*, at 118, 119) that it would be "improper for me to discuss the merits of the case" and that "[t]here are many ways to defined [sic] geographical areas."¹¹ What is more, we consulted with the Council in the preparation of our opening brief, which incorporates suggestions made by it. The Council has advised us that it has not taken the position that an impact statement for any particular geographical area is required by NEPA.

4. Respondents also assert that the Environmental Protection Agency supports them. The letter of William Ruckelshaus in 1972, quoted at Resp. Br. 64-65, suggests that "over-view statements" should be prepared whenever possible. The *National Impact Statement* is such a statement. Nothing in Mr. Ruckelshaus' comments indicates that the Northern Great Plains region defined by respondents is a necessary or appropriate area for such study. The 1972 comments of Mr. Ruckelshaus quoted at Pet. App.

¹¹ CEQ's comments upon the *National Impact Statement* (at p. 9-24) do not suggest that impact statements are necessary for regions smaller than the Nation but larger than the Eastern Powder River Basin.

37A-38A, n. 28, and at Resp. Br. 97-98, indicate that a comprehensive study "similar to the Southwest Energy Study" should be carried out. But the Southwest Energy Study is not an impact statement. It is an overview—an overview remarkably similar in scope and function to the Northern Great Plains Resources Program, which EPA participated in and which was designed and carried out after the date of Mr. Ruckelshaus' letter. The Department of the Interior has, therefore, carried out the analysis that the EPA Administrator requested.¹²

5. Respondents' brief contains numerous factual assertions not taken from the findings of the district court. While we do not propose to dispute the accuracy of these assertions,¹³ we believe that they must be approached with caution. Very few of the

¹² Regardless whether NEPA required the Department to undertake the Northern Great Plains Resources Program, the fact remains that it did so.

¹³ With one significant exception. Respondents state (Br. 11), as did the court of appeals (Pet. App. 5a, n. 4), that "[f]ourteen federal coal leases covering 90,000 square miles, issued prior to the effective date of NEPA, are presently operating." In fact, the entire "Northern Great Plains region" proposed by respondents contains only 90,000 square miles. The findings of fact of the district court (*id.* at 88A-89A) indicate that 167,000 acres (approximately 261 square miles) are under lease. Of these, mining is being carried on in leases totaling 14,785 acres (approximately 23 square miles). See pages 175-179 of the record in the court of appeals. The surface area actually mined is still smaller. The Belle Ayr South mine of Amax, Inc., the most productive coal mine in the nation, mines only 160 acres (one-quarter square mile) per year. Affidavit of W. Hollie Hopper, Amax Br. X5-X9.

figures, statements, and assertions pertain to the region defined by respondents. Their "region" (see Resp. Br. 103) contains less than half of the area of Montana, North Dakota, South Dakota and Wyoming. The Northern Great Plains Coal Province defined by the Department of the Interior, however, contains most of Montana, North Dakota and South Dakota, one-third of Wyoming and Nebraska, and portions of Colorado and New Mexico (see *National Impact Statement* 1-35, 2-26, 2-47). The interrogatories propounded by respondents, and the answers upon which many of the district court's factual findings are based (App. 150-172), deal with the full area of Montana, North Dakota, South Dakota and Wyoming. And the Northern Great Plains Resources Program studied "63 counties covering 91.6 million acres [approximately 143,125 square miles] of Montana, Wyoming, North Dakota, South Dakota, and Nebraska. The analyses of physical resources focused on the coal fields of the Fort Union Formation * * *. The analyses of other resources, in several instances, covered a much larger portion of the five-state area * * *" (April 1975 review, p. 3).

As this discussion indicates, the available statistics and data pertain to areas different from the "region" defined by respondents. In fact, the map at Resp. Br. 103 is significantly misleading. The map shows a large shaded area (indicating coal deposits), surrounded by a line defining respondents' region. In fact, the shaded area does not represent coal deposits at all; it is drawn from a geologic map (Plate

A-3, NGPRP) showing only geologic formations, which may or may not contain coal. Respondents nevertheless ask the Court to infer that they have selected the most, if not the only, logical boundary for "regional" analysis. But respondents' map omits a depiction of most of the coal in the area. The map that follows depicts *all* of the coal fields in the States in question.

COAL FIELDS of the NORTHERN GREAT PLAINS and ROCKY MOUNTAIN PROVINCES



FROM: National Impact Statement 2-19, 2-48, (1976)

As this map demonstrates,¹⁴ respondents' region is quite arbitrary. Any number of other lines could have been drawn to encompass all or part of the coal-bearing portions of these States. And respondents have yet to demonstrate why their border is not only preferable but also mandatory.

6. Respondents' rely (Br. 51) upon *Jones v. Lynn*, 477 F.2d 885 (C.A. 1), a case not discussed in our opening brief. The First Circuit has indicated that *Jones* does not support respondents. See *Chick v. Hills*, 528 F.2d 445, 448 (C.A. 1) (until the federal government adopts a plan for participation in a large program, there is no need for an impact statement analyzing the entire program; statements on smaller portions of the program are sufficient). Respondents cite numerous other cases (Br. 50-62) as supporting their position. We believe that our opening brief and the opinion of Judge MacKinnon characterize more accurately the holdings of these cases, and we will not repeat this discussion.

¹⁴ This map, like respondents', exaggerates the size of the coal deposits. Relatively discrete areas within the shaded portions of the map contribute almost all of the economically recoverable coal. Compare Plate B-3 of the Northern Great Plains Resources Program maps (back pocket) with page 100 of the April 1975 "Review" of that Program. Plate B-3, which most closely approximates respondents' region, demonstrates that less than five percent of the shaded area of respondents' map contains a "known stripping coal deposit." Very few mines are located within 50 miles of any other mine. Only 30 active or proposed mines are scattered throughout 90,000 square miles.

7. Twenty-two states have filed a brief as *amici curiae*. This brief is a theoretical overview of the usefulness of comprehensive impact statements. We do not believe that our presentation is necessarily inconsistent with the position of these States. *Amici* have not requested this Court to affirm the judgment of the court of appeals. And we have agreed (Br. 36-38) that impact statements must comprehensively analyze the effects of the proposal in question. The question in this case, however, is not whether a particular impact statement must be comprehensive, but whether there must be an impact statement at all for the region respondents have chosen.

For the foregoing reasons, in addition to those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

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v.

SIERRA CLUB, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS
AMERICAN ELECTRIC POWER SYSTEM, ET AL.

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REPLY BRIEF FOR PETITIONERS
AMERICAN ELECTRIC POWER SYSTEM, ET AL.

Respondents make no effort to defend the basis asserted by the majority of the Court of Appeals for the decision below. Rather, they would have this Court go even further than that court was willing to go and hold that a regional environmental impact statement is required by Section 102(2)(C) of NEPA for coal

development throughout the so-called Northern Great Plains region, even though the individual proposed projects within that area are not part of an actual or proposed program or plan for such development. We have demonstrated in our initial brief that respondents' contention (as well as the decision below) is contrary to the language of Section 102(2)(C), to its legislative history, to the decision of this Court in *SCRAP II*, and to the overwhelming weight of authority in the lower courts. Hence, despite the 113-page length of respondents' brief, we believe that a relatively brief reply will be sufficient.

The 113 pages of respondents' brief in themselves demonstrate the insubstantiality of their purported belief (see Br., at 33-40) that the Interior Department now has adopted their view that NEPA requires the preparation of "regional" environmental impact statements for coal development despite the absence of any regional plan, program or other region-wide federal action. In any event, the contrary view of Interior, as well as of the Government generally, is plain to see from the brief filed on behalf of Secretary Kleppe and the other federal petitioners.

Under its new coal leasing policy set forth in the Appendix to our initial brief, Interior expects that in "many cases . . . , as determined by the Secretary, several coal leases, or mining plans, may be covered in a single regional environmental impact statement, rather than by multiple environmental impact statements," and that "the region covered will be determined by basin boundaries, drainage areas, areas of economic interdependence, and other relevant factors;" while in "other cases, single coal leases or mining plans will be analyzed . . ." (*id.*, at 10a-11a). This does not differ

significantly from the practice forecast by former Secretary Morton at the commencement of this litigation that "the information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of" NEPA "in a more satisfactory manner" (A. 124), which continued to be the "Department's posture with respect to future statements" at the time of the proceedings on remand (A. 163), was subsequently confirmed by Secretary Kleppe (A. 194-195), and has in fact been the Department's practice as the preparation of the Eastern Powder River EIS as well as individual statements indicates. See page 14 and n. 18 on page 25 of our initial brief.

But however that may be, there is no issue in this case as to the discretion of Interior or other government agencies to consider several proposals for federal action in a single impact statement, whether on a regional basis or otherwise, if the agency deems that to be a more appropriate or convenient means of complying with NEPA than individual statements. The issue here is whether NEPA *requires* the Agriculture, Army and Interior Departments to prepare a single regional environmental impact statement for all government actions relating to coal development throughout the entire Northern Great Plains "region" as defined by respondents, despite the absence of any actual or proposed regional program, plan or other region-wide federal action.

Respondents concede, as they must,¹ that "no actual plan has been produced" (Br., at 86) and that they "do not seek a determination by this Court that regional planning is required" (Br., at 88) as "the com-

¹ See pages 6-9, 16 of our initial brief.

plaint did not request the adoption of a regional plan as contrasted to regional analysis in an environmental statement and no such issue is before this Court" (Br., at 38-39);² but rather state that they "simply maintain

² While respondents assert a belief "that such a plan would indeed be extremely desirable and that regional planning probably is required by NEPA" (Br., at 38), the depth of their conviction as to the requirements of NEPA in that regard can be measured by the fact that they have refrained from even contending that regional planning is required. As this Court pointed out in *United States v. SCRAP*, 412 U.S. 669, 694 (1973) ("*SCRAP I*"), and reaffirmed in *SCRAP II* (422 U.S., at 319), "NEPA was not intended to repeal by implication any other statute." Hence, NEPA does not compel the federal petitioners or other federal agencies that implement statutes which are nationwide in scope, such as the Mineral Leasing Act, to adopt instead a regional approach or to combine their operations (as respondents in effect would require Agriculture, Army and Interior to do) in a kind of super Tennessee Valley Authority. See the Government's brief, at 43-48. While some of the lower courts have held or suggested that NEPA has a "substantive" as well as a "procedural" content, as the court below noted (App. A, at 31A n. 25 and accompanying text), none of the cases there cited or any others of which we are aware holds or suggests that NEPA requires regional planning or any other particular course of action. Rather, they simply hold or suggest that the federal courts, in reviewing a particular federal action under the arbitrary or capricious standard, may look to whether or not the agency gave good faith consideration to the environmental factors revealed by an impact statement. For example, while the Seventh Circuit has adopted that approach to judicial review, *Sierra Club v. Froehlke*, 486 F.2d 946, 951-953 (7th Cir., 1973), it pointed out that under that standard of review, as this Court held in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), the "court is not empowered to substitute its judgment for that of the agency" (486 F.2d, at 953); and the Seventh Circuit has also made plain its view that, apart from its "procedural requirements . . . , no judicially enforceable duties are created by" NEPA as the "declarations of a national environmental policy and a statement of purpose . . . are not sufficient to establish substantive rights." *Bradford Township v. Illinois State Toll Highway Auth.*, 463 F.2d 537, 540 (7th Cir., 1972), cert. den., 409 U.S. 1047 (1972). See also, e.g., *Lathan v. Brinegar*, 506 F.2d 677, 692-693 (9th Cir., 1974); *McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir., 1971).

that the lack of a regional plan cannot change the federal petitioners' responsibilities under NEPA" (Br., at 88-89). In simply making that contention, however, respondents' 113-page brief virtually ignores the language and legislative history of Section 102 (2)(C) of NEPA which, as we have demonstrated (Br., at 26-30), make unmistakably clear that an impact statement is not required until an agency makes a recommendation or report upon a *proposal* for major federal action, and that the impact statement is to be directed at the environmental impacts of the *proposed action* rather than of all actions or potential actions within some broad area such as the 90,000 square mile "region" defined by respondents.

Moreover, while respondents do at least make an effort to deal with this Court's *SCRAP II* decision (see Br., at 42-47, 58-60), their own discussion of the decision indicates, as we have demonstrated in detail in our initial brief (pp. 30-35), that *SCRAP II* is inconsistent with respondents' contention that NEPA now requires a regional impact statement for the entire Northern Great Plains. Thus, respondents concede that this Court held that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal for action" (Br., at 43; emphasis in the original), and that the "crucial criterion for the scope of an environmental impact statement was deemed to be . . . the nature and effect of the particular federal decision" (Br., at 54). And certainly this Court, in emphasizing that both the timing and scope of an environmental impact statement relate to a particular proposal for major federal action, did not hold or suggest that separate recommendations or reports upon a number of individual proposals necessitate a comprehensive

impact covering all such proposals as respondents contend (Br., at 42, 44, 59).

Indeed, respondents' fundamental reliance in this Court, as in the courts below, is upon its "environmentally, geographically and programatically related" theory which is refuted at pages 35-44 of our initial brief. While respondents in making that argument and in their Statement of the Case make a wide variety of broad assertions about potential environmental effects of coal development in the Northern Great Plains, those assertions are neither supported by the findings or evidence in this case nor relevant to the issue before the Court, and respondents' comparisons between various coal producing areas of the country are frequently misleading.³ In making their many assertions that all projects in the region are "related" or "closely related," respondents have completely ignored the finding of the trial court (F. 31, App. D, 96A) that there "is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by plaintiffs as the 'Northern Great Plains region' are being planned and constructed as part of any integrated plan or program for any such area, or that any such individual

³ For example, in comparing eastern versus western coal, respondents cite (Br., at 92) a publication entitled "Facts About Coal in the United States" as if it were a Government publication. In fact, it is a private publication by the Environmental Policy Center which fails to distinguish, as most Government publications do distinguish, between total coal reserves and those which are economically recoverable with existing technology. See, e.g., the Mineral Industry Survey prepared by the Division of Fossil Fuels, U.S. Dept. of Interior, Bureau of Mines, "Demonstrated Coal Resource Base of the United States on January 1, 1974" (Washington, D.C., June 1974).

projects are interrelated or integrated with other like projects in such area." Thus, as Secretary Kleppe affirmed (A. 198), approval of a particular mining plan or other proposed action "would not commit the Department to the approval of other mining plans or other coal related development proposals in the Northern Great Plains."

In such circumstances, as we have demonstrated (Br., at 37-42), the courts have consistently held that an environmental impact statement may be limited to the particular proposed project and need not cover other projects even where such projects are part of the same overall program or plan or subject to common studies. At the time we wrote our initial brief, the only contrary decision was *Conservation Soc. of S. Ver., Inc. v. Secretary of Tran.*, 508 F.2d 927 (2d Cir., 1974), and that decision had been remanded by this Court for further consideration in the light of *SCRAP II*. See n. 23 on page 37 of our initial brief. The decision of the Second Circuit on remand has now been reported. *Conservation Society v. Secretary*, 8 ERC 1762 (2d Cir., 1976).⁴ The Second Circuit reversed its prior decision on this issue, stating (*id.*, at 1764) that:

"We also affirmed the holding of the district court that an EIS be prepared for the entire 280-mile length of Route 7 even though no plan then existed for constructing the superhighway through Connecticut, Massachusetts and Vermont. 508 F. 2d at 934-36. The Supreme Court remand here cites *SCRAP*, *supra*, which holds that a federal agency must prepare its EIS at 'the time at which it makes a recommendation or report on a proposal

⁴ A copy is also included as an appendix to the initial brief of the federal petitioners.

for federal action.' 422 U.S. at 320 (emphasis in the original). Here the findings of the district court were that, although federal officials had knowledge of the overall planning process of state officials, there was no 'overall federal plan' for improving the corridor into a superhighway. 362 F. Supp. at 636. The federal action being taken here relates only to the twenty-mile stretch between Bennington and Manchester in Vermont. The stretch is 'admittedly a project with local utility.' 508 F.2d at 935. Hence we see no irreversible or irretrievable commitment of federal funds for the entire corridor and under *SCRAP* no obligation for a corridor EIS. See *Friends of the Earth v. Coleman*, 513 F.2d 295, 299-300 (9th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283-85 (9th Cir. 1974)."

Hence, the Second Circuit has now fallen in line with the other lower courts on this issue, and its decision demonstrates that those holdings of the lower courts accord with, and indeed are commanded by, this Court's *SCRAP II* decision. Since approval of one proposed coal project in the Northern Great Plains region will not irreversibly or irretrievably commit the federal petitioners to approve other such proposed projects and since concededly there is no "overall federal plan" for that region, NEPA does not require a regional EIS for that 90,000 square mile area just as it does not require a "corridor EIS" for the entire 280-mile length of Route 7.

The decision on remand by the Second Circuit also demonstrates the futility of respondents' effort (Br., at 60-62) to distinguish the cases upon which we rely on the basis of factual differences. While factual differences of course exist, the comprehensive EIS which respondents seek is far more extreme than that sought

in any of those cases, and respondents appear to concede (Br., at 61) that those cases have "a common thread" in that "the courts found 'the proposed project had independent utility so that its approval did not commit the government to other aspects of the overall project, program or plan.'" It is that "common thread," of course, which constitutes the governing principle that the courts have derived from NEPA, and that principle plainly is applicable here. The individual projects not only have independent utility so that approval of one would not commit the government to approve others, but there is also a complete absence here of an overall project, program or plan for the Northern Great Plains region.

None of the cases relied upon by respondents are even remotely to the contrary. Those cases involve either the coverage by an EIS of all aspects of a single project or program (see Br., 50-54), or of cumulative environmental effects within the immediate vicinity of the proposed project (see Br., 54-57). The lengths to which respondents have been forced to go in attempting to dredge up some kind of precedent is illustrated by their reliance (Br., 53-54) upon *Cady v. Morton*, 527 F.2d 786 (9th Cir., 1975). That case held that an EIS prepared for approval of a 770 acre mining plan should also have covered the entire 30,876 acres leased by Westmoreland Resources (one of the petitioners here) (*id.*, at 794-795). If respondents' contentions in this Court were correct, the Ninth Circuit should have held that the EIS must cover all proposed federal actions by all applicants within the approximately 58,000,000 acres of the entire so-called Northern Great Plains region. Moreover, the Ninth Circuit also held in *Cady* that the area subject to the approved mining plan could

be mined pending preparation of an EIS for the entire leased area (527 F.2d, at 798), while respondents seek to enjoin all federal actions and operations pursuant thereto pending preparation of a regional EIS for the 90,000 square mile area of their so-called Northern Great Plains region.

Respondents' contention that CEQ, EPA, Interior and other federal agencies have construed NEPA to require comprehensive impact statements for related federal actions (Br., at 62-72), even if true, is irrelevant as it ignores the finding that the individual proposed projects in the Northern Great Plains have not been shown to be related. Moreover, the position of the Government in this case demonstrates its view, including that of Interior, that "regional" impact statements are not required in the absence of region-wide proposed federal action, even though they may at times be prepared as a matter of discretion. Respondents' contention that the projects in the Northern Great Plains are related (Br., at 73-89 not only is contrary to fact and to the findings of the trial court, but reduces in essence to the truism that all projects within a given geographic area are located within that area and have environmental impacts within that area. That could be said, of course, of any area which respondents or anyone else might chose to define as a "region" and is entirely irrelevant. As we have demonstrated, NEPA requires that an EIS consider the environmental impact of the particular proposed major federal action to which an agency recommendation or report relates, not of all such actions within some broad geographic area.

Respondents' argument that it "is impossible, except cumulatively, to analyze 'the environmental impact of the proposed actions[s]'" (Br. at 89; generally at 89-95) demonstrates its deficiency by the addition of the plural "[s]" to the word "action" which appears in the statute in the singular. If the statute required an impact statement to analyze the environmental impact of all proposed actions, rather than of a particular proposed action, respondents might have a case, but that is not what the statute provides or was intended to provide. Moreover, relevant cumulative impacts are considered in the statement upon a particular proposed federal action (see n. 19 on page 27 of our initial brief), as are reasonable alternatives to the proposed action, and the national coal programmatic EIS and Eastern Powder River EIS considered many of the broad issues with which respondents purport to be concerned.

Respondents' argument that CEQ and EPA have concluded that NEPA requires a regional impact statement for the Northern Great Plains, which conclusion is entitled to great weight by this Court (Br., at 95-101), is factually erroneous. The CEQ guideline to the effect that in "many cases, broad program statements will be required" (Br., at 95-96), and CEQ's statement that agencies "should continue the practice of preparing statements covering the cumulative effects of the broader programs, as prescribed in" its guidelines (Br., at 96-97), cannot and do not apply here where there is no "broad program." Moreover, Interior did prepare a national coal program programmatic EIS in connection with its new national coal leasing policy. So, too, the February 1975 statement by the Chairman of CEQ of a principle which he noted that Interior "recog-

nizes" (Br., at 97) could not have referred to an EIS for respondents' Northern Great Plains region, as Interior obviously has not recognized any such requirement.⁵ The Administrator of EPA (Br., at 97-98) simply suggested a "study of coal development in this region" (the area of which he did not define), and that suggestion was in fact carried out by the so-called NGPRP study.

Furthermore, the comments of EPA on the draft impact statements included in the final statements made available in connection with the supplemental findings on remand (See App. E, 113A-116A) did *not* object to the fact that the particular statement did not cover a broader area (see, *e.g.*, pp. VII-880 through VII-901, and particularly p. VII-892, in Vol. VI of the Eastern Powder River EIS). And while those statements do not include the comments of CEQ, respondents attached its comments on the draft Eastern Powder River EIS to their Supplemental Memorandum for Appellants (filed on October 9, 1974 in the Court of Appeals). Those comments also do *not* object to the fact that the EIS does

⁵ The memorandum by a member of CEQ's staff (Br., at 96) did not state that a regional EIS was required by NEPA rather than simply being deemed by the author to be more appropriate, did not define what the author meant by the Northern Great Plains, and did not represent the position of CEQ itself. Rather, it was simply sent by the Chairman of CEQ to the Secretary of Interior for his consideration of the "comments and suggestions" made therein with a request that the Secretary "let me know what you think," without any endorsement by either the Chairman or by CEQ. (See the covering letter included in Addendum A to Appellants' Reply Brief in the Court of Appeals.)

not cover some broader area, such as respondents' Northern Great Plains region.⁶

Respondents' contention that the area they define as the Northern Great Plains region is the appropriate area for a regional impact statement (Br., at 102-108) is irrelevant in view of the fact that a regional impact statement is not required by NEPA. Moreover, even the majority of the Court of Appeals recognized that "absent abuse of this power, definition of the proper region for comprehensive development, and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees" (App. A, 45A-46A, n. 33). The choice by the federal petitioners of areas for regional impact statements that differ in size from the one preferred by respondents obviously would not be an abuse of power or discretion. See, *e.g.*, *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 230 (7th Cir. 1975), *cert. den.*, 44 U.S.L.W. 3531 (1976).

Respondents' final argument that further agency action cannot be taken prior to the preparation of sub-regional statements (Br., 108-111) is irrelevant in view

⁶ In any event, the CEQ "Guidelines are merely advisory," *Hiram Clark Civic Club, Inc. v. Lynn*, 476 F.2d 421, 426 (5th Cir., 1973), and it is the substantive agencies—such as Agriculture, Army and Interior—that in fact administer NEPA, not CEQ or EPA. See *SCRAP I, supra*, 412 U.S., at 694. Hence, it is their views which should be given the most weight by this Court, and they clearly do not construe NEPA as requiring an impact statement for the Northern Great Plains region. And, of course, the views of any agency cannot overcome a contrary statutory mandate. See, *e.g.*, *PMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *American Ship Bldg. v. Labor Board*, 380 U.S. 300, 318 (1965); *Labor Board v. Brown*, 380 U.S. 278, 291-292 (1965).

of the facts that NEPA does not require such impact statements, that the issue of the adequacy of such statement prepared by Interior in its discretion (the Eastern Powder River statement) was not raised in the complaint and is not involved in this case,⁷ and that Interior has made clear that to the extent that other such statements may be prepared, federal action on the proposed projects involved will not be taken until the statement is prepared (see Br., at 109-110).

In sum, respondents' brief, despite its massive length, does not detract in any way from the demonstration in our initial brief that the plain language of Section 102(2)(C) of NEPA, its legislative history, the *SCRAP II* decision by this Court, and the overwhelming weight of authority in the lower courts all support our position that a regional environmental impact statement for the so-called Northern Great Plains region is not required. This Court should so hold.

Respectfully submitted,

⁷ Despite the fact that respondents concede that "the adequacy of the Eastern Powder River Statement is not before this Court" and was not placed in issue by the complaint or litigation below (Br., at 110), and the further fact that (as Judge MacKinnon noted, App. A., 55A n. 5) they have refused to bring a separate lawsuit in that regard on the ground that it would be "inconvenient," respondents now invite this Court to remand that issue to the District Court or, apparently, to give approval to respondents raising the issue in another lawsuit (Br., at 111). Under the circumstances, either alternative is unjustifiable.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

Supreme Court, U. S.
FILED

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No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
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V.

SIERRA CLUB, INC., ET AL., *Respondents.*

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AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
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V.

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On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR AMICI CURIAE

Western Fuels Association, Inc., Basin Electric Power Cooperative,
Inc., Heartland Consumers Power District, Lincoln Electric
System, Missouri Basin Municipal Power Agency, Tri-State
Generation and Transmission Association, Wyoming Municipal
Power Agency and Cajun Electric Power Cooperative, Inc.

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 Inc., Heartland Consumers Power District, Lincoln Electric
 System, Missouri Basin Municipal Power Agency, Tri-State
 Generation and Transmission Association, Wyoming Municipal
 Power Agency and Cajun Electric Power Cooperative, Inc.

On January 12, 1976, this Court granted the petitions for writ of certiorari and consolidated these re-

lated cases. This brief is submitted by the above-noted Amici Curiae pursuant to Rule 42(1), (2) of this Court. All parties to this action have consented to the filing of this brief and their consents have been lodged with the Clerk.

DESCRIPTION AND INTEREST OF AMICI CURIAE¹

Western Fuels is a non-profit membership corporation formed under the laws of the State of Wyoming whose purpose is to obtain coal and the fuel supplies required for the generation of electric energy by its members to serve the needs of the end-use consumers of each member. Western Fuels has the responsibility to provide a dependable source of coal to supply the needs of the Laramie River Station, a coal-fired generating facility to be located near Wheatland, Wyoming, having an on-line capacity of 1500 megawatts. The Laramie River Station has been proposed and is being developed by the other Amici who join in this Brief, excluding Cajun.

Western Fuels has the further responsibility of providing coal to Cajun to be used for purposes of generation of electric power by Cajun for distribution in its service area which includes primarily rural customers in Louisiana.

Basin is a regional wholesale power generation and transmission cooperative headquartered in Bismarck,

¹ The following references identify the respective amici curiae; Western Fuels Association, Inc.—“Western Fuels”; Basin Electric Power Cooperative, Inc.—“Basin”; Heartland Consumers Power District—“Heartland”; Lincoln Electric System—“Lincoln”; Missouri Basin Municipal Power Agency—“MBMPA”; Tri-State Generation and Transmission Association—“Tri-State”; Wyoming Municipal Power Agency—“WMPA”; Cajun Electric Power Cooperative, Inc.—“Cajun”.

North Dakota. Basin was organized by member cooperatives to provide its constituent members with self-generated, low cost thermal power and to integrate that power with hydroelectric power being supplied by the Bureau of Reclamation, an agency of the United States Department of the Interior whose functions include the marketing of hydroelectric power and energy produced at projects constructed and operated by the Bureau itself or by the Corps of Engineers, United States Army. These projects include the federal government's extensive complex of irrigation, flood control and navigation projects in the Missouri River Basin, as well as other such projects in the western United States.

Basin's membership and service area includes eight states—North and South Dakota, Montana, Colorado, Wyoming, Nebraska, Iowa and Minnesota. Its service area extends from the Canadian border in North Dakota and Montana through east central Colorado and western Nebraska, and from southwest Minnesota and northwest Iowa to western Montana and the north and east portions of Wyoming. Basin, through its member cooperatives, provides power for more than 100 rural electric cooperatives which in turn distribute the power to the end-use consumers which include more than 300,000 rural families, businesses and industries. Basin's end-use consumers comprise a group of more than one million people, the majority of whom are rural families.

Basin's goals since its inception have been to provide the rural communities in its service area with a reliable power source at low cost, thus satisfying the area's present power requirements and allowing for

rational economic expansion by increasing the availability of power.

Basin is a participant in the Laramie River Station.

Heartland is both a public corporation and a political subdivision of the State of South Dakota which was formed in 1969 pursuant to a voters' referendum. Heartland is a non-profit public utility district whose purpose is to supply electric energy and encourage and extend electric use throughout South Dakota which will foster economic growth in that area.

Heartland's service area consists of 36 counties in eastern South Dakota. Heartland's activities are confined to rural areas only and its specific function is to engage in wholesale bulk power supply and activities incidental thereto.

Heartland is required to sell electric energy at wholesale directly to any municipality, political subdivision, rural electric association, electric distribution cooperative, or any person, firm, association, or corporation which in turn generates, transmits, or distributes electricity on a non-profit basis in South Dakota. When any such entity makes application for the purpose of securing electric energy, Heartland must supply that power if it has the requested amount of electric energy available for sale.

Heartland is a participant in the Laramie River Station.

Lincoln is a municipally operated electric utility owned by the City of Lincoln, Nebraska. The territory served by Lincoln encompasses all areas within the city limits of Lincoln and the area which surrounds

those limits by approximately three miles. Lincoln has the right to serve all territories which may become annexed by the City in the future. Further, Lincoln owns and operates facilities serving certain nearby villages and covers approximately 190 square miles in Lancaster County, Nebraska, with a population of 175,000.

Lincoln both generates electric power to fulfill a portion of its needs and purchases power from the Nebraska Public Power District. Lincoln's energy requirements have nearly doubled since 1967 and they are expected to continue in this trend for the next ten years. The City of Lincoln, being the seat of the state and county governments, is a growing community with a diversified economy which links the large agricultural area nearby with that of commerce, industry and government. Lincoln also is a trade and commercial center; its heavy and light industry, food processing and meat packing concerns complement the agricultural resources of Nebraska's farm and ranch community. Further, Lincoln is an educational center which is the site of the University of Nebraska at Lincoln, having a student enrollment of more than 20,000, and is the site of Nebraska Wesleyan University, Union College and several vocational schools.

Lincoln is a participant in the Laramie River Station.

MBMPA is a non-profit organization comprised of municipal electric utilities in the states of Iowa, Minnesota and South Dakota, which functions in the form of a semi-governmental body pursuant to local statutory provisions. MBMPA's membership presently includes 61 municipal electric utilities which serve a population base of approximately 222,000 persons in Iowa,

Minnesota and South Dakota. MBMPA expects participation in the future by other municipalities.

MBMPA serves as a planning center and acts as a bargaining agent to supplement the power supply efforts of the individual member municipalities. This function offers the member utilities alternate planning schemes that incorporate the economies of scale ordinarily not available to individual municipal utilities when acting independently.

MBMPA is a participant in the Laramie River Station.

Tri-State is a non-profit corporation created in 1952 for the purpose of providing its members with a firm, long range supply of wholesale electric power. Tri-State presently acts as a wholesale power supplier for twenty-five distributing consumer owned utilities located in Colorado, Nebraska and Wyoming. Tri-State's service area covers 125,000 square miles in the western part of Nebraska, northwestern Colorado and a major part of Wyoming. Through its twenty-five distribution members, Tri-State serves more than 95,000 consumers.

While some of Tri-State's end-use consumers are industrial and commercial, the majority are rural residential consumers. Tri-State has in the past provided transmission services so that its members could more readily receive power from the Bureau of Reclamation. It has represented its members' interests in various coordinated power supply efforts and has contracted to become a partner in an electric generating project in Colorado.

Tri-State is a participant in the Laramie River Station.

WMPA is a non-profit organization comprised of nine municipal electric utilities located in Wyoming. WMPA was established to provide a supplemental source of power to its members after the year 1976, since the municipal utilities' present supplier, the Bureau of Reclamation, has given notice that it could not provide additional power for increasing needs of the municipalities after 1976. WMPA's function is to furnish power to its members in the most economical manner. To execute its duties, WMPA has the power to construct transmission, generation and related facilities, and it may furnish the power to its members either by generation and transmission or by purchase. WMPA has no generating capacity.

WMPA is a participant in the Laramie River Station.

With the exception of Western Fuels, each of the aforementioned entities is a preference customer of the Bureau of Reclamation and purchases a substantial portion of its power and energy requirements from the Bureau.²

Basin, Heartland, Lincoln, MBMPA, Tri-State and WMPA, a map of whose service areas is included as Appendix A, have undertaken to construct the Laramie River Station, a large, thermal-electric generating

² Section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h(c)) and Section 5 of the Flood Control Act of 1944 (16 U.S.C. § 825s) require that preference in the sale of hydroelectric power from the Bureau of Reclamation and Corps of Engineers projects, respectively, be given to municipalities and other public agencies and to cooperatives. The Secretary of the Interior, through the Bureau of Reclamation, markets power from the Corps of Engineers Pick-Sloan Missouri River Basin Project hydroelectric plants as well as from the Bureau's own plants. See note 3, *infra* at 10.

plant to be located in Platte County in southeastern Wyoming. The approximate site of the Laramie River Station is indicated on the map at Appendix A.

The proposed Laramie River Station will be a coal-fired steam-electric generating plant consisting of three units, each having a capability of 500 megawatts. A site of some 2400 acres will be utilized by the Station on which will be located the power plant itself, substation facilities, coal loading and storage facilities, a unit-train railroad loop, cooling towers and ash handlers and disposal facilities. The Laramie River Station project also includes a dam and reservoir of about 100,000 acre-feet capacity on the Laramie River. The Laramie River Station, including the dam and reservoir and backbone transmission lines, has an estimated construction cost of \$1,360,000,000.

The current production schedule provides that the first 500 megawatt unit will be placed in service in January of 1980, the second unit will come in service in the summer of 1980, and the final unit will become commercial in the summer of 1983. Once the units come on line, the above-noted six entities will utilize the power according to a Participation Agreement, whereby Basin holds a 42.27% share of the facility, Tri-State holds a 24.13% share, Lincoln holds a 13.33% share, MBMPA holds a 16.47% share, Heartland holds a 2.80% share and WMPA holds a 1.00% share. The six participants will hold the station as tenants-in-common.

By agreement, Basin has the responsibility for the design and construction of the plant and will act as operating agent for the project generation and transmission facilities. Basin's active role in these aspects

of the Laramie River Station is valuable in that Basin has constructed coal-fired plants in the past and has distinguished itself in construction activities by its efforts to protect the environment from unnecessary disruption during construction and operation of the plant. Basin undertook extensive environmental safeguards prior to any state or federal regulations pertaining to air and water quality and strip-mine land reclamation. Several examples will illustrate Basin's concern.

As early as 1962, Basin required in its fuel contracts that the coal supplier restore the topography of the strip mined area to rolling countryside after mining operations had ceased. This contractual provision was not required by state or federal law.

In early operation of Basin's Leland Olds power plant, North Dakota law would have allowed Basin to dump its fly ash (60,000 tons annually) into the Missouri River. Basin collected and impounded the ash and returned clean, effluent water to the river.

In 1967, Basin advocated, supported and testified on behalf of state air pollution control legislation. North Dakota passed such legislation in 1969. Basin has taken similar efforts in support of water quality legislation and spoil bank legislation.

Basin's experience in and concern for environmental protection will be evidenced in the techniques and method of construction and operation of the Laramie River Station.

The genesis of the Laramie River Station extends back to the latter part of the 1950's. As indicated above, residents of the Northern Great Plains had depended

upon the Bureau of Reclamation for their power needs. However, the Secretary of the Interior in 1959 and again in 1961, notified the power consumers in that area that the Pick-Sloan Missouri River Basin Project³ which supplies the rural electric cooperatives and other preference customers with hydroelectric power and energy, would not be able to meet their additional requirements beyond the winter of 1965. These consumer owned utilities were confronted with three basic choices: to purchase power from investor owned utilities at higher cost; to construct small thermal generating plants throughout the area with high fuel, capital and operating costs; or to join together, pool their needs and resources and construct large generating units which would meet their power needs. The latter option was utilized.

Joint planning efforts were undertaken by the consumer owned utilities in the upper Missouri River Basin, covering all or parts of Montana, Wyoming, Colorado, North and South Dakota, Nebraska, Minnesota and Iowa. The objective of the joint planning is the installation of generating and transmission facilities on a schedule meeting power needs in a fashion calculated to achieve for the participants the economies of scale inherent in the construction of large base-load generating units, the advantages of integrating fossil-fueled generating units with the hydro-generating de-

³ Authorized by Section 9 of the Flood Control Act of 1944 (58 Stat. 891), the project is a coordinated plan developed by the Corps of Engineers and the Bureau of Reclamation for the control and development of the waters of the Missouri River and its tributaries for the multiple purposes of flood control, navigation, irrigation, municipal and miscellaneous water supply, hydroelectric power, recreation and fish and wildlife conservation and enhancement.

velopments undertaken by the federal government as a part of the Pick-Sloan Missouri River Basin Project, and the advantages of pooling together transmission facilities with costs shared on a proportionate use basis. This joint planning has resulted in power plants such as the Leland Olds Plant in Stanton, North Dakota and the William J. Neal Station in Velva, North Dakota.

Despite these actions, the power requirements of the consumers served by the six participants in the Laramie River Station are such that demand will exceed supply, with an ever-widening gap between need and supply, if the in-service schedules, whereby two 500 megawatt units will be on line by June 1, 1980, with the third on line by June 1, 1983, are not met in a timely fashion.⁴

An extensive siting and economic study was performed in early 1973 for the participants in the Laramie River Station, which considered more than seventy possible combinations of site location, generating type and size, fuel source, water supply, cooling method, and transmission delivery systems. This study indicated that the site area promising the lowest cost for long range base-load power supply throughout this area and appearing to have no unusual environmental impact, was at mine-mouth, or near mine-mouth locations in eastern Wyoming. Ultimately, the most advantageous site for the Laramie River Station was de-

⁴ For a detailed discussion and analysis of the participants' load growth and power supply needs, see "Preliminary Report on the Feasibility Study for the Laramie River Station," July 1, 1975. Burns and McDonnell Consulting Engineers. Copies will be made available to all parties and to the Court upon request.

terminated to be in Platte County, in southeastern Wyoming. *See* Appendix A.

An important factor in the selection of the site for the Laramie River Station is its proximity to the Eastern Powder River Coal Basin of Wyoming which, as the Federal Petitioners point out, contains more than one quarter of the nation's strippable coal reserves.⁵

Western Fuels is responsible for securing the coal supplies for the Laramie River Station. It has arranged for three separate sources of coal from the Eastern Powder River Coal Basin.

Western Fuels has acquired applications pending before the Department of the Interior for the issuance of preference right coal leases under Section 2 of the Federal Mineral Leasing Act of 1920, 30 U.S.C. § 201, covering Eastern Powder River Coal Basin coal, which it estimates will produce at least 60 million tons of coal by surface mining.

Western Fuels has entered into contractual arrangements with El Paso Energy Resources Company, which itself has acquired certain preference right lease applications for coal in the Eastern Powder River Coal Basin pending before the Department of the Interior, under which coal will be supplied from that source. Analyses within the Department of the Interior of the applications for preference right leases held by Western Fuels and El Paso are in progress.

Western Fuels has contracted with Sunoco Energy Development Co. for the purchase of 60 million tons of coal from the Cordero Mine in the Eastern Powder

⁵ Petition for Writ of Certiorari, *Frizzell, et al. v. Sierra Club, et al.*, No. 75-552, at 8.

River Coal Basin on a delivery schedule consistent with start-up needs at the Laramie River Station. Sun holds the Cordero Mine under a lease from the Secretary of the Interior issued in 1971 pursuant to the coal leasing provisions of the Federal Mineral Leasing Act. 30 U.S.C. §§ 201-209.

Sun's application for approval of the mining plan for the Cordero Mine is presently before the Secretary of the Interior. A draft site-specific environmental impact statement covering the mining plan has been published by the Department of the Interior and has been released for public comment.

If the decision below is ultimately upheld, the impact upon the Laramie River Station, the six participants therein and their consumers, would be devastating. The court below clearly considers the Eastern Powder River Coal Basin to be encompassed within the larger so-called "Northern Great Plains Region" which is the subject of its decision. As a practical matter, the injunction entered by the court below (which was stayed pending a decision on the merits by this Court's order of January 12, 1976) threatens again to halt development of federal coal and all further coal related activities, if it should again become effective.⁶

⁶ While the injunction's terms prevented the Secretary of the Interior from taking action only concerning the four mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement, the court below made no secret of the fact that the limited reach of the injunction was based, in large part, on a continuation of the "forbearance" of the federal appellees in authorizing activities "in the Region" pending issuance of the then-unissued Northern Great Plains Resources Program Report. Even more pointedly, the court below "urged" appellees to take no action that "would defeat the purpose" designed to be served by a comprehensive regional

If this Court determines that the preparation of such an environmental impact statement is necessary, or if this Court decides, as did the court below, that the parties here must return to the District Court for further proceedings there, great and costly delays will result. The preparation of an environmental impact statement for an area as large as the "Northern Great Plains Region" no doubt would take years to accomplish. Further, the promulgation of that impact statement could and probably would engender further litigation concerning its sufficiency.

As stated above, the Laramie River Station, through Western Fuels, has contracted for and established sources of coal which are located in the "Northern Great Plains Region." A decision by this Court requiring the preparation of an EIS prior to mining

impact statement for the Northern Great Plains, while deciding whether to prepare such a comprehensive EIS. Apparently in order to make sure that the federal appellees "got the message" the court below noted that "the courts remain open, to appellants and others," should the federal appellees decide nonetheless to approve any private endeavors in the Northern Great Plains. Finally, in what surely must rank as a supreme "gilding of the lily," the court followed up with the statement that it did not need to reach the issue of whether an injunction against activity, either ongoing or proposed, in the Northern Great Plains should issue pending preparation of a "comprehensive regional impact statement," noting that "a responsible policy of restraint by the federal appellees with respect to authorizing such activity might make the question moot." Pet. 75-552, App. A, 51A-52A.

The chilling effect of such admonitions is obvious, not only upon federal officials but also upon non-federal interests contemplating coal and coal related activities, during the entire period pending completion of a regionwide EIS contemplated by the court below, and litigation over its adequacy or, in the alternative, pending litigation over decisions by the federal officials involved not to undertake preparation of such an EIS. *Id.*, App. A, 49A-52A.

this region, or a decision which would result in lengthy remand proceedings, could eradicate the Station's sources of coal. In the absence of a reliable source of coal from the Eastern Powder River Basin, the timing of the completion and operation of the Laramie River Station will be delayed, and the entire project may be placed in jeopardy. Failure of the Laramie River Station to come on-line according to the schedule described above will cause irreparable harm to the consumers of electric energy in the participants' service areas and to the general economy of those areas as well.

Cajun is a non-profit electric power system serving rural customers in Louisiana. Cajun is a wholesale power supplier for twelve of the thirteen rural electric cooperatives now existing in Louisiana. Cajun's members' service areas encompass approximately 80% of the surface area of the State, and have a population of approximately 750,000.

Cajun presently generates 35% of its requirements from an existing thermal generating plant, Big Cajun No. 1, and purchases the remainder of its requirements from investor owned utilities in Louisiana. Based on representation of its suppliers that Cajun will no longer be able to rely on them to meet its power and energy needs, Cajun is in the process of developing two additional 540 megawatt coal-fired generating units to be known as Big Cajun No. 2. The first of these units is scheduled to go on line in the last quarter of 1979; the second in the third quarter of 1980. Both are needed if Cajun is to meet increasing requirements for reliable and economical power and energy for Louisiana's rural people, agriculture and industry in the 1980's. When fully operational, Big Cajun No.

2 will require approximately four million tons of coal per year.

To assure an adequate source of coal, Cajun has executed a contract with Shell Oil Company for coal to be mined from the Youngs Creek Mine in Big Horn County, Montana, on the Crow Indian Reservation, a part of the "Northern Great Plains Region" as conceived by the court below. In addition, Cajun has executed a contract with Pullman Standard, division of Pullman, Inc., for 848 open top gondola cars to ship by rail Youngs Creek coal from Montana to St. Louis, Missouri. From St. Louis, American Commercial Barge Line Co. has contracted to barge the coal on the Mississippi River to the Big Cajun No. 2 plant site.

Shell Oil Company's right to Youngs Creek coal is derived by virtue of a lease issued Shell by the Crow Tribe. Pursuant to 25 U.S.C. § 391, *et seq.*, the Secretary of the Interior has the jurisdiction to approve mineral leases of Indian lands by various Indian tribes, including the Crow Tribe.⁷ As a corollary to this jurisdiction, the Secretary has, by regulation, exerted jurisdiction over the actual extraction of minerals by virtue of requiring Department approval of mining plans developed by the leaseholder. 25 C.F.R. § 177.7.

Shell has requested Interior Department approval for its coal development and, thus, the decision of the court below if sustained and if the injunction is rein-

⁷ The lease was approved by the United States Department of the Interior on June 8, 1972. The validity of the Shell lease, along with other Crow Tribal leases, is presently being challenged. *Crow Tribe of Indians v. Kleppe, et al.*, No. CV-76-10 BLG (D. Mont., filed February 3, 1976).

stated, effectively enjoins the federal defendants from going forward on approval of the Youngs Creek Mine.* As a result, in a fashion similar to the consequences of the delays in federal approvals needed for the coal supply for the Laramie River Station, the timely delivery of coal for Big Cajun No. 2 is endangered, thereby jeopardizing the power supply for Cajun's rural customers.

SUMMARY OF ARGUMENT

In addition to joining in the arguments of the Petitioners in 75-552 and 75-561, these Amici assert that, following notice from the Secretary of the Interior

* In *Cady v. Morton*, No. 74-1984 (9th Cir., June 19, 1975) the Ninth Circuit held that Secretarial approval of coal leases of substantial acreage of Crow Indian owned coal constituted a major federal action requiring the preparation of an EIS under NEPA and that NEPA's requirement could not be satisfied simply by EIS's prepared for individual mining plans covering portions of the leaseholds.

The Ninth Circuit in *Cady* did not go beyond holding that an EIS must be prepared for the project contemplated by the Crow leases therein considered as well as for the individual mining plans. It did not hold that a "regional" EIS of the nature contemplated by the court below in the decision under review was required. Indeed, the Ninth Circuit made clear, by citing with approval its earlier holding in *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir. 1975), that it continues to adhere to the "irretrievable commitment of resources" test in determining the adequacy of an EIS. See *Cady v. Morton, supra*, slip at — (8 ERC at 1102 n.9).

Stated briefly, the "irretrievable commitment of resources test" provides that an EIS is sufficient if it discusses all of the activity to which resources are irretrievably committed by the project for which the statement has been prepared. See e.g., *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975); *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975); *Friends of the Earth, Inc. v. Coleman, supra*.

that the federally generated hydroelectric power would be insufficient to meet load growth and that therefore the people of the Northern Great Plains area must make their own arrangements for non-federal power to meet their requirements, these Amici initiated, developed and, in part, consummated plans to obtain for themselves a firm bulk power supply through their own coal-fired, steam generating plants. The difficulties experienced by these Amici in developing bulk power generation and in obtaining the required coal resources related thereto on an independent basis and without affirmative federal assistance, demonstrates that no federal program or proposal exists for the development of coal resources in the "Northern Great Plains Region."

ARGUMENT

These Amici Curiae join in the arguments of the Federal Petitioners in 75-552 and of the American Electric Power System, *et al.*, in 75-561, that the National Environmental Policy Act' (hereinafter NEPA) does not require the preparation of an environmental impact statement for the so-called "Northern Great Plains Region."

Briefly stated, those arguments are: that both the plain words of NEPA and the legislative history thereof, require the preparation of environmental impact statements only where a recommendation or report upon a proposal for federal action is made and that no such recommendation or report has been made with respect to the "Northern Great Plains Region"; that the decision below is in conflict with this Court's de-

* 42 U.S.C. §§ 4321, 4331-4335, 4341-4347.

cision in *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289 (1975); and that mere contemplation of federal action does not require the preparation of an environmental impact statement. In addition, these Amici argue, on the basis of their own experience, that no federal plan exists for development of or control of development of the coal resources of the so-called "Northern Great Plains Region," separate and apart from application of the coal leasing provisions of the Mineral Leasing Act¹⁰ and other federal permit authority over federal or federally controlled coal lands wherever situated in the United States.

THE SPECIFIC EXPERIENCES OF THE AMICI HERE DEMONSTRATE THAT THERE IS NO FEDERAL PROPOSAL FOR THE DEVELOPMENT OF COAL IN THE SO-CALLED "NORTHERN GREAT PLAINS REGION"

The requirement for an environmental impact statement arises where there is a recommendation or report on a "proposal" for a major federal action. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

The District Court found (Pet. 75-552, App. D, F. 29, 95A) that "There is no existing or planned Federal Program or action in the area defined by the plaintiffs as the 'Northern Great Plains region' . . . as to which the Federal Government has made commitments to take further steps to carry out proposals." The District Court further found (*id.*, F. 29, 96A) that, "There is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by the plaintiffs as the 'Northern Great Plains region' are being planned or constructed as part of any inte-

¹⁰ 30 U.S.C. §§ 201-209.

grated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in this area."

The experience of these Amici amply demonstrates the correctness of those findings.

As indicated above, these Amici developed, fostered and implemented their own plans for developing a bulk power supply on an independent basis, without receiving specific affirmative aid from, or taking part in, an established federal program.

In 1959 and again in 1961, the Secretary of the Interior notified the preference customers purchasing hydroelectric power from the Pick-Sloan Missouri River Basin Project that federally generated power would not be sufficient to fill the needs of the consumers in the upper Missouri River basin. They were told to initiate their own efforts aimed at securing a firm source of electric power to meet their growing needs and to allow for reasoned economic growth in the area. The Amici here, on an individual basis or in cooperation with each other, did exactly that.

Moreover, as the District Court found (*id.*, App. D, F. 12-13, 89A-90A), and as the court below conceded, (*id.*, App. A, 5A, 34A) an attempt by the Secretary of the Interior to coordinate energy development throughout the North Central States (an area not entirely synonymous with the so-called "Northern Great Plains") was abandoned as a failure.

In the absence of a federal plan for development of a bulk power supply for their service areas, the Amici proposed, planned, developed, financed, con-

structed and operated their own sources of electric generation.

These Amici (other than Cajun) now seek to add a new source of electric generation—the Laramie River Station. In the development of the Station, no federal plan for development of bulk power supply was utilized, nor was one available. The sole activity of the federal government is fulfilling the passive role of issuing approvals, permits and loaning funds.

The same is true of Cajun in respect to Big Cajun Nos. 1 and 2.

As particularly related to coal development, the Amici, primarily through Western Fuels, took affirmative action on their own to locate and secure reliable coal sources. The only action to be taken by the federal government is the consideration of specific lease applications and mining plans which were initiated through the efforts of these Amici and their private suppliers.

The difficulties encountered by these Amici and the affirmative, independent steps which they took to secure coal sources, belies the assertion of the Respondents here that a federal proposal or program exists for the development of coal in the "Northern Great Plains Region," as distinguished from the federal government's administration of the Mineral Leasing Act and other permit authority in relation to federally controlled coal lands, wherever located, throughout the United States.

CONCLUSION

For the foregoing reasons, we join Petitioners in urging that the judgment of the court below should be reversed and the case remanded with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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Dated: February 26, 1976

Certificate of Service

I, Edward Weinberg, hereby certify that on February 26, 1976 the Brief for Amici Curiae in the above captioned proceeding was served upon all counsel, pursuant to Rule 33 of the Supreme Court Rules, by mailing copies by first class mail, postage prepaid, as follows:

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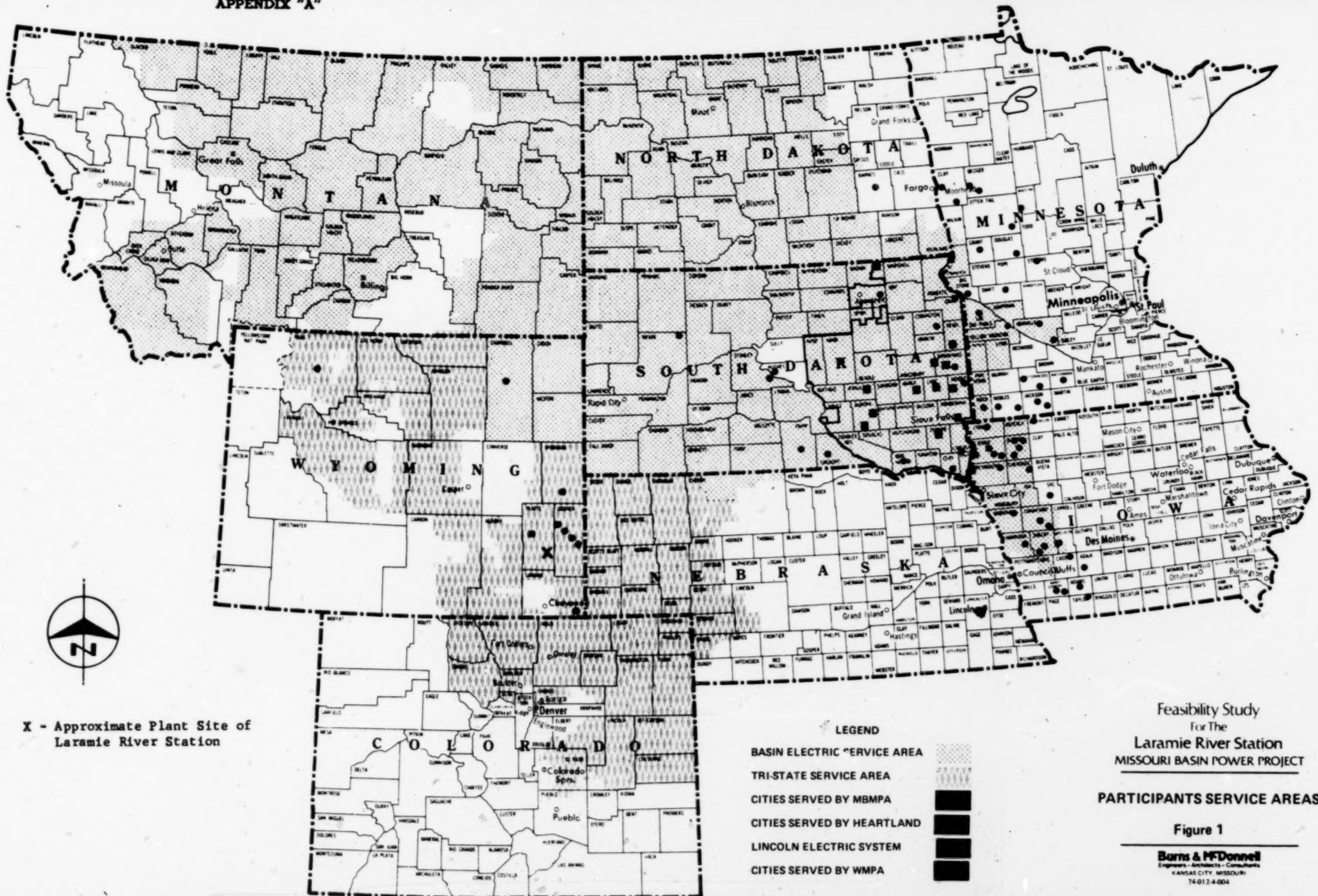
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APPENDIX

APPENDIX "A"



FEB 26 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF AMICUS CURIAE
FOR UTAH POWER & LIGHT COMPANY**

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February 1976

IN THE
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THOMAS S. KLEPPE, Secretary of the Interior, et al.,
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Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF AMICUS CURIAE
FOR UTAH POWER & LIGHT COMPANY**

Utah Power & Light Company (Utah Power) respectfully submits this brief *amicus curiae* for consideration of the Court. Consents to the filing of this brief have been obtained from both Petitioners and Respondents and have been filed with the Clerk of this

Court. Utah Power supports the position of Petitioners and urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and to remand the case with instructions to affirm the Judgment of the District Court.

THE INTEREST OF UTAH POWER & LIGHT COMPANY

Utah Power is engaged principally in the business of generating and selling electric energy in Utah, southeastern Idaho and southwestern Wyoming. The Company's service area in these three states covers 79,000 square miles, with a population of about 1,200,000. Coal is the predominant fuel source for Utah Power's generation of electric power, and its use is increasing. In 1974, coal was the fuel source for 88 percent of the Company's power generation, and in 1975 coal provided 92 percent of its fuel supply.

Utah Power burned approximately four million tons of coal in 1975. At the present time the Company has under construction in the State of Utah three electric generating facilities, one at Huntington and two at Emery. Each generating facility will have a capability of 400 megawatts and all three power plants will use coal as its fuel. The Company estimates that each of the three units will burn 1.2 million tons of coal annually when in full operation, or nearly as much coal for the three units under construction as was burned in 1975 by the Company at its existing facilities. The State of Utah, through the Utah Air Conservation Committee, has determined that the Company must utilize coal at all three new facilities that has a maximum sulfur content of 0.6 percent on the average, as one of the conditions for not requiring the

Company to install and operate sulfur removal equipment. Moreover, the Company also has in the advanced planning stages two generating facilities to be located in Wyoming, each of which will utilize coal as its fuel source. The Company estimates that each of the Wyoming units will burn 1.4 million tons of coal annually when in full operation.

In order to assure an adequate and reliable source of low sulfur coal, Utah Power obtained assignments of eight coal prospecting permits covering approximately 18,325 acres of land in Utah owned by the federal government. The eight coal prospecting permits were issued pursuant to Section 201(b) of the Mineral Leasing Act, 30 U.S.C. § 201(b). Exploration for coal pursuant to the permits took place in 1970 and 1971, preference right lease applications were filed in 1972, assigned to the Company in 1973 and are still pending at the Interior Department.

On July 17, 1974, the United States Geological Survey issued a memorandum to the State Director of the Bureau of Land Management (BLM) recommending that the BLM issue preference right leases to Utah Power covering the 18,325 acres of federal land, with the proviso that the Company be required to submit a mining plan that would include procedures for minimizing pollution and timely reclamation of surface disturbances caused by the underground mining that ultimately takes place on the leased lands.

The basis for the Geological Survey's recommendation that the preference right lease applications of Utah Power be granted was its determination that workable coal deposits "in commercial quantities"—the sole statutory prerequisite to lease issuance pursuant to section 201(b) of the Mineral Leasing Act—

were discovered on each of the eight prospecting permits assigned to Utah Power.

Now that Secretary Kleppe has publicly announced that "there is no need to continue the moratorium on new coal leasing which was established nearly four years ago," and since the Interior Department has issued its *Final Environmental Impact Statement: Proposed Coal Leasing Program* (hereinafter referred to as the Coal Leasing EIS), it is Utah Power's hope that the preference right leases to which it believes it is legally entitled will be issued promptly in order that a mining plan may be developed and an environmental impact statement with respect to such plan be prepared—the necessary prerequisites to opening the underground mine the Company contemplates.

The decision of the court below represents a serious threat to timely development of the low sulfur coal contained in federal lands that are the subject of Utah Power's pending preference right lease applications. If that decision is not reversed and the judgment of the District Court reinstated, the Company's ability to proceed with a mining plan covering some 18,000 acres and involving several hundred million tons of needed low sulfur coal—in the absence of some undefined, unnecessary "regional" impact statement and the attendant delays which the Government acknowledges would take place with such an approach—would be significantly hampered, if not altogether foreclosed. This threat is no less real, we submit, because the federal lands as to which Utah Power has discovered "commercial quantities" of coal are not within the so-called "Northern Great Plains," or the "Northern Great Plains Province." The court below stated that the "relevant geographic area for development still

seems somewhat uncertain" (App. A, 45A), and Judge MacKinnon, in dissent, pointed out "the clear possibility that other potential plaintiffs could seek an infinite progression of 'regional' statements covering 'regions' of their own choice, thus seriously disrupting any attempt by the federal [petitioners] to deal with the development of a critical national resource." (*id.*, 57 A, n.7).

Utah Power therefore has a direct interest in supporting the Petitioners' effort to obtain a reversal of the decision below. In so doing, Utah Power assumes that both the federal and private petitioners will deal in some detail with the significant legal issues presented and it will therefore seek to avoid burdening this Court with repetitive legal argument.

ARGUMENT

The decision of the court below is directly contrary to this Court's subsequently issued decision in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) (hereinafter cited as "*SCRAP II*"), that NEPA does not require an impact statement by a federal agency until "the time at which it makes a recommendation or report on a proposal for federal action." The decision is also at odds with this Court's recognition in *SCRAP II* of the appropriateness under NEPA of the federal petitioners' practice of considering environmental impacts of individual projects in statements that pertain to such projects rather than in an overall "regional" statement for some undefined region. The ruling of the court below also conflicts with decisions of other circuit courts of appeals upholding impact statements pertaining to a specific proposed project which had independent utility, even though part of a larger, more comprehensive program.

**I. The Lower Court's Decision is Contrary to This Court's
SCRAP II Decision.**

In *SCRAP II*, this Court very clearly held that under NEPA, "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action" (422 U.S. at 320; emphasis is the Court's). Moreover, this Court specifically repudiated an earlier decision by the court below, *Calvert Cliffs Coordinating Committee v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), and two Second Circuit decisions which "read the requirement that the statement accompany the proposal through the existing agency review process differently" from the Court in *SCRAP II* (422 U.S. 321 n.20). The court below in *Calvert Cliffs* had interpreted NEPA to require that "environmental issues be considered at every important stage in the decision making process concerning a particular action," and it therefore ruled that the environmental impact statement must be considered during staff level proceedings before any recommendation, report or proposal by the agency itself for federal action upon such application. 449 F.2d at 1118. That interpretation of NEPA was heavily relied upon in the decision of the court below here (App. A, 42A-43A).

Of particular significance to the underlying issue here of the appropriateness of the federal petitioners' practice of analyzing environmental impacts of particular projects in statements that relate to such projects and not to so-called "regional" impacts is this Court's rejection in *SCRAP II* of the lower court's attempt to require the ICC to expand the scope of its impact statement. Holding that the ICC could properly limit the scope of its impact statement regard-

ing a general rate increase to those environmental issues directly related to such general action, and consider in future proceedings directly related to specific commodities the environmental issues thus raised, this Court ruled that the lower court's contrary conclusion embodied "an entirely unwarranted intrusion into an apparently sensible decision by the ICC" (422 U.S. at 326). By the same token, it is far more "sensible," we submit, for the federal petitioners to consider the environmental impacts of a specific mining plan, such as, for example, Utah Power's plan for underground mining of low sulfur coal on federal lands in southern Utah, than to attempt some broad, sweeping "regional" approach that would embody different kinds of coal, mined by different methods (surface) in a different part of the State or "region," on the totally unsupportable premise that such an approach is either legally required or practically illuminating.

**II. The Lower Court's Decision With Respect to the Required
Scope of an Environmental Impact Statement Conflicts
With Decisions of Other Courts of Appeals.**

The court below refused to follow decisions of other circuits, e.g., *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); and *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973), which have upheld impact statements limited to a particular proposed action acknowledged to be part of a more comprehensive program because the particular proposal had independent utility so that approval did not represent a commitment on the part of the federal government to the more comprehensive project. Utah Power thinks it clear that those decisions are correct and that

subsequent decisions of like import such as *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *cert. pending*, No. 75-951, *Trinity Episcopal School Corporation v. Romney*, 523 F.2d 88, 95 (2d Cir. 1975), are likewise in harmony with the requirements of NEPA. Because we assume that the petitioners will deal extensively with this aspect of the issues before the Court, we will not do so. The weight of authority makes it clear that "regional" impact statements are not required by NEPA and we urge this Court to once again make the point so that the federal petitioners may proceed to permit the development of critically needed coal resources on a specific mining plan/environmental impact statement basis without further unnecessary delay.

CONCLUSION

For the foregoing reasons, Utah Power & Light Company, as *amicus curiae*, urges the Court to reverse the decision of the court below and to remand the case with instructions to affirm the Judgment of the District Court.

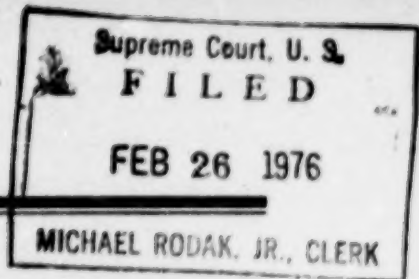
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February 1976



IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

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Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF THE STATE OF UTAH
AS AMICUS CURIAE**

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February 1976

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On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF THE STATE OF UTAH
AS AMICUS CURIAE**

The State of Utah, appearing by its undersigned Attorney General, respectfully tenders this brief as *amicus curiae* for the consideration of this Court. The State supports the position presented by the Solicitor General on behalf of the Secretary of the Interior and urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and to remand the case with instructions to affirm the Judgment of the District Court.

THE INTEREST OF THE STATE OF UTAH

The State of Utah contains one of the largest Federal coal-bearing areas in the United States. Although Utah is not specifically included in respondents' denomination of the so-called "Northern Great Plains Region," or in the Court of Appeals' somewhat different delineation of the "Northern Great Plains Province" (App. A, 2A), the decision of the court below poses a threat to the timely development of vast amounts of high quality low sulfur coal in Federal lands within the State. Apart from the fact that the Court of Appeals acknowledged that the "relevant geographic area for development still seems somewhat uncertain" (*id.*, 45A) and stated that "definition of the proper region for comprehensive development, and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees" (*id.*, 45A-46A, n.33), there are a number of pending private applications for coal lease issuance and mining plan approvals before the federal petitioners that relate directly to the development of coal in the State of Utah.

Thus, according to the federal petitioners' national coal programmatic impact statement issued in final form as the *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program* (hereinafter referred to as the Coal Leasing EIS) "it is apparent that interest in future Federal coal leasing will generally focus around coal deposits in Montana, Wyoming, Utah, and Colorado and to a lesser extent, North Dakota and New Mexico" (Coal Leasing EIS 1-83).¹ And, according to the federal petitioners' Bureau of

¹ A copy of the Coal Leasing EIS was lodged with the Clerk by the federal petitioners.

Land Management and U.S. Geological Survey, there are pending 14 federal preference right coal lease applications covering 39,091 acres of Federal lands in the State of Utah in which the recoverable coal reserves are estimated to amount to 599 million tons (*id.* at 1-81, Table 1-27).

Moreover, insofar as coal reserves held under Federal leases are concerned, the State of Utah is first among all the states in the number of such leases (195), the total acres leased (266,700) and—perhaps more importantly, in terms of environmental considerations—the size of underground (as distinguished from strippable) recoverable reserves (3,319 million tons) (*id.* at 1-81, Table 1-26). In 1972, almost twenty percent of all coal produced from federal leases and more than twenty-four percent of federal income from such leases, prospecting permits and licenses came from mines in the State of Utah (*id.* at 1-80, Table 1-23). It is also worth noting that all coal in Utah is mined by underground methods, and that coal is of high quality and low sulfur content.

The State of Utah is fully committed to achieving and maintaining the most rigorous level of pollution control that is consistent with the best interests of all of its citizens in all portions of the State. One means which the State has utilized to meet its commitments in this regard has been to require that three new electric power generating facilities now under construction in Utah to meet our growing demands for energy only burn coal with an average sulfur content of 0.6 percent or less. Programs such as this depend upon the availability of low sulfur coal in adequate supply. The decision below constitutes a genuine threat to both the economic and environmental health of the State of

Utah and its citizens, and the State therefore has a clear interest in seeking reversal of the judgment of the Court of Appeals and a remand of the case with instructions to affirm the Judgment of the District Court.

ARGUMENT

The ruling of the lower court is in fundamental conflict with the determination of Congress and this Court's recent decision in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) (hereinafter cited as "*SCRAP II*") that Section 102(2)(C) of NEPA requires that an environmental impact statement be included "in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment," and that the "time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." 422 U.S. at 320 (emphasis is the Court's). The District Court found that there "is no existing or proposed Federal regional program, plan, project, or other regional 'federal action' within the meaning of NEPA Section 102(2)(C) for the development of coal or other resources in the area defined by plaintiffs as the 'Northern Great Plains region'" (emphasis is the Court's). Although the court below accepted "the facts as found by the District Court" (App. A, 39A), including the finding with respect to the absence of any existing or proposed federal program, plan or other regional federal action concerning coal or other resource development in the so-called Northern Great Plains region, it nonetheless held that "comprehensive major federal action is contemplated in the Northern Great Plains" (*id.*) and it intervened to require the

federal petitioners to prepare a separate "regional" environmental impact statement covering all development of coal and related resources within the "region" so long as the federal petitioners continue "contemplating" private applications. This holding is directly contrary to this Court's recent *SCRAP II* decision that Section 102(2)(C) of NEPA does not require an impact statement if "no proposal, recommendation, or report" has been made by an agency with respect to the federal action in question. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320-321 (1975).

The ruling of the court below also conflicts with decisions of circuit courts of appeals which have upheld impact statements limited to a specific proposed action even though such proposed action was acknowledged to be part of a more comprehensive project or program because the specific proposed project had independent utility so that its approval did not constitute a commitment on the part of the federal government to the more comprehensive project. *See, e.g., Sierra Club v. Stamm*, 507 F.2d 788 (C.A. 10, 1974); *Trout Unlimited v. Morton*, 509 F.2d 1276 (C.A. 9, 1974); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (C.A. 9, 1973). The court below disagreed with these cases and held that an impact statement must assess, in a comprehensive manner, all actions and environmental impacts that might be related to the proposed action. In so ruling, the court relied upon *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F.2d 927 (C.A. 2, 1974), *vacated and remanded sub nom., Coleman v. The Conservation Society of Southern Vermont, Inc.*, "for further consideration in light of" *SCRAP II*, 44 U.S.L.W. 3199 (October 6, 1975). Although the Court of Appeals

purported to distinguish the cases in other circuits on the ground that those cases "involved the propriety of an injunction against an individual project pending completion of a regional [impact statement] or other study," and "[n]one of the cases involved a direct challenge to the need for a regional" impact statement (App. A, 39A. n.29), Judge MacKinnon in dissent aptly pointed out that this "is a classic example of a distinction without a difference" (*id.* at 65A). The fact that the decision below is a clear and unwarranted departure from the plain language of NEPA, this Court's *SCRAP II* decision and the decisions of other circuits concerning the required scope of environmental impact statements.

I. Congress Has Not Required Federal Agencies To Prepare "Regional" Impact Statements or Any Impact Statements in the Absence of a "Recommendation or Report on Proposals . . . For Major Federal Actions."

Section 102(2)(C) of NEPA expressly provides that federal agencies shall include "in every recommendation or report on proposals for legislation and other major Federal actions" significantly affecting the quality of the human environment a detailed statement concerning the effects of, and alternatives to, the "proposed action." There is no language on the face of the statute that requires a "regional" impact statement, and neither respondents nor the court below pointed to such language either in the body of NEPA itself or in the Act's legislative history. What is manifest from the face of the statute, however, is that an environmental impact statement is not required in the absence of a recommendation or report by a federal agency upon a "proposal for major Federal action." It is the recommendation or report on "*proposals* for

major Federal actions" that triggers the statutory command for a detailed statement of specified effects, alternatives and commitments of resources—all of which relate specifically to the "*proposed action*," and none of which pertains to private applications pending before and being contemplated by federal agencies, such as the federal petitioners. Since there has been no federal proposal for regional action relating to development of coal anywhere in the United States, no regional impact statement is required by NEPA and the federal courts are not free to engraft such requirements onto the Act or to substitute their judgment for the federal agencies as to the wisdom of proceeding on a regional or any other basis.

II. The Decision of the Court of Appeals Is Contrary to This Court's *SCRAP II* Decision.

This Court's *SCRAP II* decision plainly held that an environmental impact statement is not required prior to an agency's recommendation or report on a proposal for major federal action. In that case, decided after the decision of the Court of Appeals in this case, the Court reversed a three-judge district court ruling that the Interstate Commerce Commission had violated NEPA in approving the railroad's request for a general rate increase applicable to recyclables as well as to other commodities. The district court decided that an "oral hearing which the ICC chose to hold prior to its October 4, 1972, order [approving the railroads' request with some exceptions] was an 'existing agency review process' during which a final draft environmental impact statement . . . should have been available" 422 U.S., at 319-320. This Court's reasons for holding that the district court's decision was erroneous are particularly instructive here:

"NEPA provides that 'such statement . . . shall accompany *the proposal* through the existing agency review processes' (emphasis added [by the Court]). This sentence does not, contrary to the District Court opinion, affect the time when the 'statement' must be prepared. It simply says what must be done with the 'statement' once it is prepared—it must accompany the 'proposal.' . . . Under *this* sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972 report, the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972—some time after the oral hearing." 422 U.S. at 320-321 (emphasis is the Court's; footnotes omitted).

Thus this Court plainly held that NEPA does not mandate an impact statement by a federal agency prior to "the time at which it makes a recommendation or report on a proposal for federal action." The Court's *SCRAP II* holding applies here and in connection with the pending applications for federal approval of preference right leases and mining plans regarding federal coal lands in Utah where there has been no agency proposal for regional coal development.

III. The Decision of the Court of Appeals Regarding the Required Scope of An Environmental Impact Statement Conflicts With Decisions of Other Courts of Appeals.

The court below ruled that "when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to 'control development' of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, . . ." and it therefore held that "comprehensive major federal action is contemplated in the Northern Great Plains. The District Court's contrary conclusion of law was in error." (App. A, 39A). The sole judicial support for this proposition cited by the lower court's majority was "the *Conservation Society* precedent" and all the cases "relied upon by appellees and the District Court" were found to be "inapposite" since [n]one of the cases involved a direct challenge to the need for a regional EIS" (*id.* at n.29). Judge MacKinnon correctly described this as "a classic example of a distinction without a difference." (*id.* at 65A).

This Court has since vacated "the *Conservation Society* precedent" and remanded it "for further consideration in light of" *SCRAP II*, 44 U.S.L.W. 3199 (October 6, 1975). The State of Utah urges the Court to now clarify the matter and resolve the clear conflict among the circuits on a subject of utmost importance to the states, the federal government and private citizens alike.

We believe the decisions of the Ninth, Tenth, Fifth, and Seventh Circuits discussed below are clearly correct and that the lower court's decision here regarding

the appropriate scope of an environmental impact statement is clearly in error.

The decision of the Ninth Circuit in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (C.A. 9, 1971), is almost directly in point. There the plaintiffs contended that impact statements issued in connection with each of several coal-fired electric generating projects for southwestern states were invalid under NEPA because the statements were issued prior to completion of a Southwest Energy Study by the Interior Department. That Study, similarly to Interior's Northern Great Plains Resources Program study, "was designed to evaluate the problems created by further development of coal-fired electric power in the Southwest." The plaintiffs argued that "consideration of the Study is essential to evaluation of the environmental impact of the . . . projects in question." 471 F.2d at 1279. In rejecting that contention, the court stated, among other things:

"It would appear that in initiating the Study, the Secretary was acting in concert with the aims of NEPA by attempting to expand the available store of knowledge pertaining to the environmental effects of the development of electric power facilities in the southwestern United States. Neither § 102(2)(B) nor (C) can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated. While appellants here have limited their argument to one specific piece of information, that does not solve the

larger problem. At any point in time, there are likely to be any number of studies underway concerning a host of environmental or other societal problems. *What appellants seek is for this Court to substitute its judgment for that of the Secretary, who is charged by NEPA with preparing a thorough statement of the environmental consequences of a proposed project, as to what particular information will be required to complete that statement. We decline to assume that role.*" *Id.* at 1280-81; emphasis supplied; footnote omitted.

Moreover, the plaintiffs' contentions were rejected with respect to a fourth project, which "is only proposed" and as to which "no federal action, major or otherwise, has been taken . . . since the effective date of NEPA." *Id.* at 1278. Thus, the court held that NEPA does not require a ban on individual projects until overall environmental studies are completed. And although in *Jicarilla*, all the coal-fired power projects were precisely identified and were related "geographically," "environmentally," and "programmatically," there was no suggestion that a "regional" impact statement was mandated.

And in *Environmental Defense Fund v. Armstrong*, 356 F.Supp. 131 (N.D. Cal. 1973), *affirmed*, 487 F.2d 814 (C.A. 9, 1973), *cert. denied*, 416 U.S. 974 (1974), the court rejected the plaintiffs' demand that it order a "comprehensive study" of the Central Valley Project in California and pending such a study enjoin one dam as to which an environmental impact statement, although completed, was challenged as inadequate in the absence of the demanded "comprehensive study." In rejecting these demands the court ruled that

"So long as each major federal action is undertaken individually and not as an indivisible, in-

tegral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. Plaintiffs' suggestion that there is need for a comprehensive study of the Central Valley Project should be addressed to the Congress, and not to the Court." *Id.* at 139.

Similarly, in *Sierra Club v. Stamm*, 507 F.2d 788 (C.A. 10, 1974), the Tenth Circuit Court of Appeals rejected an argument that the impact statement for the Strawberry Aqueduct and Collection System was "too narrow in scope, and should be a final statement at least for the entire Bonneville Unit, if not indeed, for the entire Central Utah Project." It had been authorized by Congress as "a plan to collect, develop and divert water in the Bonneville and Uinta Basins of Central Utah for municipal, industrial, agricultural and recreational purposes." *Id.* at 789. The Tenth Circuit affirmed the district court's finding that the Strawberry System "has an independent utility of its own" and "can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project." *Id.* at 791. On the basis of the district court's findings and in reliance upon the holdings of *Jicarilla* and *Armstrong*, *supra*, and *Sierra Club v. Calloway*, 499 F.2d 982 (C.A. 5, 1974), the Tenth Circuit concluded that the "Strawberry system in and of itself constitutes a 'major Federal action' and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system." *Id.* at 792-93. The court below specifically declined to follow *Sierra Club v. Stamm* (App. A, 41A, n. 29). The *Calloway* case relied upon by the Tenth Circuit in *Stamm*,

likewise upheld an impact statement limited to one dam construction project. The lower court in *Calloway* had granted an injunction on the ground that the single dam project was not in and of itself an individual "major federal action" but merely "an increment of the much larger Trinity River Project." In reversing the lower court decision, the Court of Appeals ruled that

"It was error to make Wallisville an evidentiary hostage of Trinity. The holding if permitted to stand could well spell the doom of the Wallisville Project in view of the uncertainties attending the Trinity Project." 499 F.2d at 993.

It is likewise erroneous and contrary to the congressional purpose in enacting NEPA for the court below to hold individual mining plan approvals of preference right lease applications as "an evidentiary hostage" of assumed regional development of the Northern Great Plains, however ultimately geographically defined, or of some other not yet conceived "region" for the development of much needed low sulfur coal resources in federal lands throughout the State of Utah and elsewhere.

As the Court of Appeals for the Ninth Circuit noted in *Daly v. Volpe*, 514 F.2d 1106, 1110 (C.A. 9, 1975), "it is important to keep in mind that although Congress has mandated that environmental exigencies must be considered by an agency, Congress has nowhere determined that such considerations must work to the abandonment of other federally mandated goals and projects." See also, *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (C.A. 8, 1973); *Swaim v. Brinegar*, 517 F.2d 766, 776, n.12 (C.A. 7, 1975); *Friends of*

the Earth v. Coleman, 513 F.2d 295 (C.A. 9, 1975); and *Trout Unlimited v. Morton*, 509 F.2d 1276, 1284 (C.A. 9, 1974).

The State of Utah respectfully submits that this case is an especially appropriate one for explicit recognition of this too-often neglected principle by some lower federal courts.

As the federal petitioners have demonstrated through affidavits submitted to the Court in support of the Solicitor General's Application for A Stay Pending Review on Writ of Certiorari, "[r]ecent international incidents threatening the security and availability of non-domestic energy supplies have led to Presidentially established goals of reduced dependency on costly and oftentimes unreliable foreign imports. These goals have amplified the demand for domestic coal production and use . . . the President announced a major commitment to increase development and use of our domestic energy, of which coal is our most abundant resource. The Secretary of the Interior has been directed by the President to *take actions to insure rapid production* from existing leases *and to make new, low sulfur coal supplies available.*" (Affidavit of Secretary of the Interior, Thomas S. Kleppe, A. 188, emphasis supplied).

Moreover, Congress has likewise recognized and acted upon the importance of the Nation's coal resources in achieving energy independence. Congress passed the Energy Supply and Environmental Coordination Act of 1974. (P.L. 93-319). Pursuant to that Act, the Federal Energy Administration is authorized to, among other things, prohibit certain power plants and major fuel consuming installations from burning natural gas or petroleum products as their primary

energy source and to require that power plants be designed and constructed so as to be capable of burning coal as their primary energy source.

As pointed out in the Affidavit of Federal Energy Administrator Zarb, on file with the Court in this case, "[i]f the United States is to achieve a reasonable degree of energy self-sufficiency, coal production will roughly have to double over the next decade. Our goal is production of slightly more than a billion tons of coal annually by 1985—the equivalent of opening a million and a half ton mine every week for the next ten years." (Zarb Affidavit, A. 207). The FEA Administrator further stated that "[t]o achieve necessary increases in coal production to meet national goals, prompt federal decisions on additional coal development are essential" and noted that "from a decision to proceed ahead, it still takes approximately three years to open a large surface mine and five years to open an underground mine." (*id.* at 208).

In their Reply Memorandum, submitted in answer to the respondents' Brief in Opposition to Grant of Certiorari, the federal petitioners acknowledged that it took them more than three years to complete their National Impact Statement on Coal Leasing (Coal Leasing EIS), which they candidly acknowledged "analyzed environmental effects in less depth than respondents apparently demand of a regional impact statement," (Reply Memo. at 3). The federal petitioners further estimated that any "regional" impact statement would likewise take "approximately three years" and of course recognized that the adequacy of such a statement "could become the subject of a challenge in the courts." (*id.*) This case has already consumed nearly three years since the re-

spondents filed their complaint and it is not yet completed.

The federal petitioners stated quite clearly in their Petition for a Writ of Certiorari that:

"... the program of impact statements for individual mines, local groups of mines, and the nation as a whole, adequately fulfills the commands of Section 102(2)(C). It is not necessary to suspend the development of coal resources for several years more while the government prepares a 'regional' impact statement as the price of continued 'contemplation.'" (p. 21).

The State of Utah fully agrees with this position of the federal petitioners. Utah is vitally interested in an early resumption of federal coal leasing. This interest is by no means to be taken as any indication that the State is insensitive to or unmindful of the need to protect the environment. Indeed, Utah has in effect substantial legislation that we believe is more than adequate for mined land reclamation, environment and safety and that either equals or exceeds the standards imposed by the Federal Government. But the fact remains that the economic vitality of the State is critically dependent upon an adequate and secure supply of energy and that the principal fuel source in the State of Utah for the provision of energy to all of its citizens is coal. The Federal Government and the State are both fully cognizant of the fact that the extensive coal reserves embedded in federal lands throughout the State of Utah are both of high quality and low sulfur content.

The time has come, we respectfully submit, for the Federal Government to be free to issue the coal lease applications that have been pending before the federal

petitioners for several years in order that the substantial quantities of low sulfur coal within the State may be mined for the benefit of the citizens of Utah and in furtherance of the President's and the Congress' goal of energy independence for the United States.

Even if the federal petitioners were to issue coal leases tomorrow, it would still be at least five years before the underground mines that would be utilized in Utah would be open for production. Certainly the issuance of an environmental impact statement for each individual mine, or local groups of mines, against the backdrop of the nationwide federal impact statement will satisfy the legal requirements imposed by NEPA. Should the respondents desire more than present law requires, their arguments "should be addressed to the Congress, and not to the Court." *Environmental Defense Fund v. Armstrong*, 356 F.Supp at 139.

CONCLUSION

For the foregoing reasons, the State of Utah, as *amicus curiae*, urges the Court to reverse the decision of the court below and to remand the case with instructions to affirm the Judgment of the District Court.

Respectfully submitted,

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February 1976

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MICHAEL RODAK, JR., CLERK

IN THE
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On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association,

AS AMICI CURIAE IN SUPPORT OF REVERSAL

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners

v.

SIERRA CLUB, INC., ET AL., *Respondents*

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association,

AS AMICI CURIAE IN SUPPORT OF REVERSAL ¹

This brief is submitted by the *amici* listed above as *amici curiae* in support of Petitioners' claim that the

¹ The *Amici* are referred to hereafter as follows: AMERICAN PUBLIC POWER ASSOCIATION—"APPA"; COLORADO RURAL ELECTRIC ASSOCIATION—"COLORADO"; MID-WEST ELECTRIC CONSUMERS

judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton, et al.*, 514 F.2d 856 (D.C. Cir. 1975) should be reversed. All parties to the action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

I. DESCRIPTION AND INTEREST OF AMICI CURIAE

American Public Power Association is the national association of more than 1400 local, publicly-owned electric utilities in 48 states, Guam, Virgin Islands, American Samoa and Puerto Rico. A number of these electric systems are large, but most are small cities, towns and villages. A large number, particularly in the Western states, are dependent upon the production of coal in the Northern Great Plains and future planning depends upon the availability of such coal. A sizeable number operate their own generating units requiring that coal. Many others purchase power at wholesale from suppliers which are dependent upon the availability of such coal.

Illustrative of the crippling problems faced by the APPA members dependent upon Western coal are the following three instances:

Muscatine Power & Water, the agency of the city of Muscatine, Iowa which operates the municipal electric

ASSOCIATION, INC.—“MID-WEST”; MONTANA ASSOCIATED UTILITIES—“MONTANA”; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION—“NRECA”; NEBRASKA RURAL ELECTRIC ASSOCIATION—“NEBRASKA”; NORTH DAKOTA ASSOCIATION OF RURAL ELECTRIC COOPERATIVES—“NORTH DAKOTA”; NORTHWEST PUBLIC POWER ASSOCIATION—“NORTHWEST”; SOUTH DAKOTA RURAL ELECTRIC ASSOCIATION—“SOUTH DAKOTA”; WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION—“WASHINGTON”; AND WYOMING STATE RURAL ELECTRIC ASSOCIATION—“WYOMING”.

system, is planning the installation of a new fossil-fired generating unit to be in commercial operation January 1, 1982. It has surveyed the major coal suppliers to determine the cost and availability of low sulphur coal in the quantities required to operate the new plant. It has encountered the same problem time and time again. The coal suppliers have indicated that the uncertainty of the outcome of *Sierra Club v. Morton* prevented them from seriously discussing or making any commitments with respect to low sulphur coal from their strip mining operations in the Western states.

The Board of Public Utilities of Kansas City, Kansas, is now purchasing approximately 150,000 tons of coal from Wyoming annually. It operates approximately 480 megawatts of installed generation. Its present generation is dual-fueled. Because of its inability to obtain natural gas, coal has become much more important to it as a fuel source. It is estimated that its need for western coal will increase to 850,000 tons annually by 1979 when its new 235 megawatt coal-fired Nearman Creek Power Station is scheduled to be put in service. It has been unable to obtain contracts to date that will insure the coal necessary to satisfy its requirements. It would appear certain that the required coal cannot become available by 1979 unless the lower court's opinion is overturned.

Another member of APPA which would be severely injured if *Sierra Club v. Morton* were permitted to stand is Nebraska Public Power District which has one of the largest electric systems of any of the APPA members. It furnishes electric service at retail to 260 municipalities and communities and supplies at wholesale the total requirements of 74 municipalities, public power districts and rural electric cooperatives. In the

aggregate these customers account for approximately one-half of the electrical power load of the State of Nebraska. Also 20 municipal electric systems with generating facilities of their own have interconnection agreements with Nebraska Public Power District pursuant to which they may purchase part of their requirements from the District.

The District now has under construction a 650 MW coal burning power plant. The estimated construction cost of the plant is approximately \$288 million and it has already obligated approximately \$206 million in contracts and commitments for engineering, equipment and construction of the project and has already expended approximately \$113 million. Commercial operation of the plant was originally scheduled for mid-1977 but because of environmental delays is now planned for mid-1978.

The District plans to use low sulphur coal to minimize the environmental impact at the generating station and has entered into a coal supply agreement with Atlantic Richfield Company to purchase low sulphur coal for the new station from Atlantic Richfield's planned coal mining operation in Campbell County, Wyoming. The injunction which has been stayed by this Court stopped the construction and development of the Atlantic Richfield mine.

Any delay in the operation of the new station as a result of an affirmance of the lower court's opinion will result in unnecessary expense to the District and its rate payers. This expense, while difficult to estimate with any degree of accuracy, would be enormous. If the District does not obtain the low sulphur coal from Campbell County, Wyoming, there is a substantial risk

that its customers would be subject to electric power curtailments resulting in brown-outs and black-outs.

The staying of the lower court's injunction by this Court on January 12, 1976, has resulted in marked improvement in the immediate situation facing the District. Following the issuance of the stay, the Interior Department issued a federal mining permit to Atlantic Richfield Company. Another favorable development following the stay of the injunction was the granting by the Interstate Commerce Commission to Burlington Northern Railroad and Chicago & North Western Railroad certificates to build the rail line between Gillette and Douglas, Wyoming. This line will serve the Atlantic Richfield mine and make possible the delivery of Atlantic Richfield coal to the District.

The District has also observed in the last few weeks that coal suppliers who were, while the injunction was in effect, unable to negotiate coal supply arrangements with it, are now willing to discuss proposals and plans. The District is most encouraged, but realizes that if the Court of Appeals decision were to be affirmed, it again will be faced with the possibility of being unable to supply the electric requirements of 334 municipalities, public power districts and rural electric cooperatives.

Mid-West Electric Consumers Association, Inc., with headquarters at Denver, Colorado, is the regional service organization of the rural electric cooperatives and publicly-owned electric systems located in the nine states comprising the Missouri Basin: Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming. Mid-West is composed

of approximately 250 systems, which serve almost 1,500,000 consumers. It was formed to obtain an adequate supply of low-cost and dependable electric power for these groups, and generally to promote the interests of electric consumers in the region.

A number of the members of Mid-West are located in or close by the Northern Great Plains. A very large percentage of the other members will also soon be dependent upon coal produced in that area. Until several years ago these members were able to purchase their power and energy requirements from the Bureau of Reclamation since they are preference customers under the Flood Control Act of 1944, which governs the sale of Missouri River power. The power sold by the Bureau to those members is generated at the government-owned dams located on the main stem of the Missouri River.

For the past few years it has been impossible for most of the members who are Bureau customers to obtain all of their requirements from that source because all of the available power has been placed under contract. In order to obtain an additional source at a reasonably low cost, the members banded together to organize generating and transmitting organizations. Examples of such organizations are Basin Electric Power Cooperative, Missouri Basin Municipal Power Agency, Tri-State Generation and Transmission Association and Wyoming Municipal Electric Joint Power Board. These organizations have joined with Western Fuels Association, Inc., and others in submitting a brief *amicus curiae* in this case. That brief explains the development of the Laramie River Project, in which the four organizations mentioned immediately above are participants. That brief also ex-

plains the injury which will result to the participants in the Laramie River Project if the coal from the Northern Great Plains Area is not made available for use in the Laramie River Project by the time it is ready to go into commercial operation. Almost all of Mid-West's members will suffer serious injury if that project is not able to operate immediately upon completion because of lack of coal. It is highly probable that brown-outs and black-outs would result. Rationing of power would be a distinct possibility.

Other members of Mid-West purchase power from suppliers who are dependent upon coal purchased in the Northern Great Plains.

It must be emphasized that not only do Mid-West members operate on a strictly nonprofit basis but they are owned and controlled by their consumers. Mid-West wishes to raise its voice in support of the interest of those consumers. They are the one who will suffer if the opinion of the Court of Appeals were to be affirmed.

Colorado, Montana, Nebraska, North Dakota, South Dakota, Washington and Wyoming are state-wide organizations, the members of which are borrowers from the Rural Electrification Administration. Each of them operates at the state-wide level in the same fashion as Mid-West does on a regional level. The members of each are deeply concerned about the possibility of brown-outs and black-outs resulting from the lower court injunction. Their worry is that in addition to the threat of blackouts and brownouts the cost of electricity to their ultimate consumer members will be greatly increased if the opinion below is not set aside. Most of their members are also dependent upon Basin Electric Power Cooperative and the Laramie

River Project for all of their power requirements in excess of those which can be made available by the Bureau of Reclamation.

National Rural Electric Cooperative Association is the trade association of the rural electric cooperatives which have been chiefly financed by the Rural Electrification Administration, an agency of the United States. It has almost one thousand members located in 46 states serving approximately 25,000,000 ultimate consumers in rural areas. Approximately 180 of such members are located in Wyoming or adjoining states. Many of the members, located both within and without such states, operate coal-fueled generating plants which plan to purchase coal from mines to be located in the Northern Great Plains. A very large number buy power and energy at wholesale from suppliers proposing to purchase coal produced in that area.

The concerns of the members of NRECA are similar to those of the Mid-West and statewide organizations' members. Almost all of the rural electric cooperatives in Wyoming and surrounding States are members of NRECA. There are also a few members in other states which generate their own power and are dependent upon coal from the Northern Great Plains Area. There are a very large number of NRECA members who buy their electric power and energy requirements from other suppliers which are to a substantial extent dependent upon such coal.

The Environmental Impact Statement for the Eastern Powder River Coal Basin considered the mining plans of four mines, the approval of which was held up by the injunction. Since the stay of the injunction the mining plans for these four mines have been approved

by the Secretary of the Interior. There is also pending before the Department of Interior the mining plans for five additional mines. A draft environmental impact statement for one of these additional mines has now been issued. It is planned that draft environmental impact statements for the remaining four mines will be issued shortly. The application for an extension of an existing mine also had been approved by the Secretary of the Interior. The companies submitting the mining plans referred to in this paragraph were Amax Coal Company, Atlantic Richfield Company, Carter Oil Company, Ker-McGee Corporation, Peabody Coal Company, Sun Oil Company and Wyodak Resources Development Corporation. The development of all these plans had been stopped by the injunction and would be jeopardized were the lower court's opinion to be affirmed.

Coal from the Belle Ayr South Coal Mine of Amax Coal Company is sold to: Interstate Power Company, Iowa Power & Light Company, Kansas Power and Light Company, Public Service Company of Colorado and South Western Electric Power Company.

Coal from Atlantic Richfield mines is sold to: Oklahoma Gas and Electric Company and South Western Public Service Company.

Coal from the Carter Oil Company mines is sold to: Indiana and Michigan Electric Company.

Coal from the Kerr McGee Corporation mines is sold to: Arkansas Power and Light Company, Arkansas and Missouri Power and Light Company, Central Louisiana Electric Company, Inc., Gulf States Utilities Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Services, Inc.

Coal from the Wyodak Resources Development Company mines is sold to: Black Hills Power and Light Company.

All of the electric utility companies listed above sell electric power to members of NRECA and most of them also sell electric power to members of APPA. In addition, Dairyland Power Cooperative, a member of NRECA, buys coal from the Belle Ayr South Coal Mine of Amax Coal Company and Nebraska Public Power District, a member of APPA, buys coal from Atlantic Richfield mines.

NRECA's members operate in sparsely settled areas. The average consumer density of all the rural electric systems in the country is 3.9 consumers per mile of distribution line. This contrast with an average consumer density of 35 consumers per mile experienced by the Class A & B electric utilities in the nation. The average consumer density of the NRECA members in Wyoming and nearby states is even much lower than is the national average. Those densities are as follows: Colorado 3.0; Idaho 2.9; Kansas 1.8; Montana 1.7; Nebraska 1.8; North Dakota 1.3; South Dakota 1.5; Utah 2.7 and Wyoming 1.7.

More than half of the total operations and maintenance expense of the rural electric systems is represented by the wholesale cost of power and energy. Thus the impact on the small systems, serving low consumer density areas with the resultant very large investment in facilities per consumer, would be tremendous if the low cost western coal is not made available to them.

Examples of the extremely serious problems which would be created for NRECA members which generate their own power are the situations which would be

faced by Cajun Electric Power Cooperative, Inc. and Dairyland Power Cooperative if the decision of the lower court is not reversed. The impact on Cajun is discussed in the brief *amici curiae* filed by Western Fuels Association, Inc., et al. in this proceeding.

Dairyland Power Cooperative is a large generating and transmission cooperative with headquarters at La Crosse, Wisconsin. The coal requirements of its Alma 6 generating unit are to be supplied by Amax Coal Company. If the latter is not permitted to supply coal to Dairyland's Alma 6 generating unit, Dairyland might possibly be able to install scrubbers and use midwest coal of higher sulphur content. The cost of the scrubbers would be \$3.3 million per year and the additional cost of coal would be approximately \$2,250,000 per year. There is no capacity in the power pool in which Dairyland is a participant from which Dairyland could purchase power to be used in lieu of the power proposed to be generated at Alma 6. Other companies in the pool are also depending upon the Wyoming coal. If Dairyland were forced to rely on purchases of power from other members of the pool after 1978, it would appear that Dairyland's members would be subjected to power outages.

Dairyland possibly could install oil-fired generation. However, in view of the oil supply shortage it would not appear to be a wise choice. The oil requirement would be approximately 115 million gallons. The added fuel cost would be approximately \$24.5 million per year.

It also should be pointed out that Dairyland does not at this time have any generating plants scheduled for retirement, nor does it have any retired plants

which could be reactivated. The construction of a nuclear plant would require a lead time of at least ten years. In short, Dairyland's Alma 6 plant, from any practical viewpoint, is entirely dependent upon western coal.

Northwestern Public Power Association is a regional association, the members of which are municipalities, public utility districts, and rural electric cooperatives, similar to Mid-West. Certain of its members are also dependent upon the availability of coal from the Northern Great Plains.

II. ARGUMENT

The *Amici* fully support the arguments presented by the Federal Petitioners and the Intervenor Petitioners in the briefs they have presented to the Court demonstrating that the decision of the Court of Appeals should be reversed. Basically, that court erred in not affirming the judgment of the District Court that a regional environmental impact statement was not required by the National Environmental Policy Act because there was no existing or proposed regional federal program for the development of coal in the area designated as a region in the complaint. The district court's finding as to the lack of an existing or proposed regional federal program in such area was questioned by no one.

Reversal is also mandated by *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, (SCRAP II) 422 U.S. 289, 320 (1975).

We shall not burden the Court with a repetition of any of the argument developed in the Petitioners' briefs which we support. We shall briefly describe

the critical importance to the entire electric utility industry, including the small, non-profit, consumer-owned utilities which are members of the *Amici*, of the early extensive development of new sources of low-sulphur western coal.

Although the recent slowdown in economic activity, the increased interest in the conservation of energy brought about by the Arab oil embargo and the consequent sky-rocketing of fuel cost caused a temporary decline in the rate of growth of the use of electricity, the demand for electricity in the United States will increase greatly in the next decade. With that increase the demand for coal must also rise sharply. Without a rapid increase in the supply of coal the electrical needs of the nation cannot be met, and the declared goal of national self-sufficiency in energy will become an impossible dream.

Coal is already the major fuel used in the production of electricity. According to the Review of Overall Reliability and Adequacy of the North American Bulk Power System, Fifth Annual Review, 1975, Appendix B, published by the National Electric Reliability Council, coal fired capacity represented 45.4 per cent of the electric generating capacity in the contiguous United States in 1975. Coal's nearest competition was oil which accounted for only 18.9 per cent of such capacity. Thus even at current levels of electric production an abundant supply of coal is critical to the electric utility industry.

Several factors are combining to enhance coal's crucial position in the near term future. One, of course, the increasing demand for electricity. The Bureau of Mines, U. S. Department of the Interior, in its publi-

cation "United States Energy Through the Year 2000", predicts a doubling of the BTU's of electricity generated by 1985 (from 19,635 trillion BTU's in 1974 to 39,090 trillion in 1985). A similar increase was predicted in the National Electric Reliability Council's study, quoted from above, which forecast an increase from 1998 billion kilowatt hours of electricity generated in 1975 to 3595 billion in 1984.

Another factor is the increasing expense and scarcity of other fossil fuels. In response to the increasing expense and danger to national security of reliance on imported oil, the Federal Government has declared the goal of national energy self-sufficiency. An integral part of this policy is the recognition of the importance of coal. The affidavits of both Kent Frizzell, Acting Secretary of the Interior, and Frank G. Zarb, Administrator, Federal Energy Administration, attached to the Application to Dissolve Injunction² submitted to the United States Court of Appeals for the District of Columbia Circuit in this case, exemplify this recognition. Both indicate that self-sufficiency requires a doubling of coal production in the next ten years. (Frizzell Affidavit, p. 2 and Zarb Affidavit, p. 3). Seventy per cent of this coal must come from mines not now in existence, thus 250 new mines averaging three million tons of coal per year must be opened by 1985 (Frizzell Affidavit, p. 2); or put another way, we must open a million and one half ton mine each week for the next ten years (Zarb Affidavit, p. 3).

These predictions of the need for coal are in line with the estimates of the National Electric Reliability Council's "Estimated Fossil Fuel Requirements, Projected

² Attached as appendices to Federal Petitioner's Brief.

Generating Capacity, and Electric Energy Production for the Electric Utility Industry (Contiguous U.S.) 1975-1984" (July, 1975), which show that for electrical generation alone the demand for coal will rise from 419.6 million tons in 1975 to 780.8 million tons in 1984. Also, Federal Energy Agency's "Project Independence Report" (November, 1974) shows that 365 new coal fired electric generating facilities of a typical size of 800 MW, must be built by 1985 under the Base Case for energy independence. (Report, p. 70).

This heavy emphasis on coal in the effort to achieve self-sufficiency is natural since the United States contains 53 per cent of the free world's supply of coal, and since coal represents 94 per cent of the identified primary energy reserves in the United States.

Natural gas and oil cannot provide the increased fuel supply needed to satisfy the demand for electricity. The shortage of natural gas has already made itself felt in a decline in the amount of natural gas used in electrical generation. Federal Power Commission News Releases No. 21089 (February 3, 1975) and No. 22152 (February 17, 1976) show that gas purchased by electric plants declined from 3,209,365.4 thousand M.C.F. for the twelve months ending October 31, 1974 to 2,942,267.4 thousand M.C.F. for the twelve month period ending October 31, 1975. Predictions for the future use of gas in the production of electricity uniformly predict a continuation of this decline. The National Electric Reliability Council Estimates indicate a drop-off from 2,721.6 million M.C.F. in 1975 to 1,614.5 million M.C.F. in 1984. The Bureau of Mines study shows natural gas input into electrical production falling from 3,328 trillion BTU's in 1974 to 1,500 trillion BTU's in 1985 (U.S. Energy p. 28).

Oil usage in the electric utility industry is not expected to decline in the next ten years, but it is not expected to be able to meet the increased need either. The Bureau of Mines estimates that while coal will account for approximately 19,000 trillion more BTU's of electric generation in 1985 than in 1974, oil will only account for an extra 2,800 (*id.*). The National Electric Reliability Council estimates show oil usage increasing by only approximately one third between 1975 and 1984 while total generation almost doubles.

The limited future for oil and gas in the electric generating industry is confirmed by the National Electric Reliability Council's "Review" which indicates that "no new major gas-fired units are to be built after 1977, and commitments to new major oil-fired units decreased throughout the period [1975-1984]." (Review, p. 4). This is in line with the government's policy of discouraging the use of oil and gas in power plants and encouraging the use of coal. The Federal Energy Administration has already ordered 25 utilities and 74 power plants to convert to coal; FEA has also told 41 companies, affecting 74 more plants in 23 states, that new plants must have coal burning capability. (Zarb Affidavit, p. 3).

The above estimates of the increased need for coal are all based on the assumption that nuclear power will also expand rapidly in the next decade. The National Electric Reliability Council's Review counts on a five-fold increase in nuclear generated kilowatt hours between 1975 and 1984 (Review, Appendix C). The Bureau of Mines' prediction is an even more optimistic tenfold increase between 1974 and 1985. (U.S. Energy, p. 28).

The Project Independence Report is far from sanguine over the short term prospects for nuclear power. It cites several potential pitfalls:

"To achieve even the low estimates of nuclear growth would necessitate a reversal of recent trends in the ability of utilities to raise investment funds and in equipment delivery and construction schedules, as well as a reduction of licensing delays. Achievement of higher levels of nuclear power could require a national commitment of manpower and other resources. The long lead time required to achieve nuclear capacity additions severely limits the possibility of increasing the number of nuclear plants which could become operational before the early 1980's." (Report, p. 115).

Even more doubt about the increased reliance on nuclear energy as a short term answer to energy independence is expressed in "The Coal Future: Economic and Technological Analysis of Initiatives and Innovations to Secure Fuel Supply Independence" written by Michael Reiber, Shao Lee Soo, and James Stukel of the University of Illinois, sponsored by Systems Integration and Analysis, National Science Foundation (May 1975). One finding of this study is that the Atomic Energy Commission under-estimated the price of nuclear power.

"AEC estimates for 1980 are slightly over 15 mills/kwhe. However, using AEC data and a methodology derived from AEC publications, it is found that the costs to a utility in 1980 will be at least 22 mills/kwhe. At the bus-bar the price is likely to be over 32 mills/kwhe." (p. I-8).

An additional point made which both indicates that nuclear costs will be higher than expected and that

less nuclear power will be available is that AEC used in its cost comparisons a load factor (the level of production achieved) of 80 per cent, while the historical load factor has been 65 per cent or less (p. II-3). The study concludes that since more coal will be used the higher the price of nuclear power rises, and that since coal will fill in the gap caused by lower than expected levels of nuclear power production, coal use will, therefore, exceed expectations "unless increased dependence on foreign oil or a major recession are postulated." (p. I-8).

With the ever increasing amounts of coal being used to produce electricity, it becomes all the more important that low sulphur coal be burned. In this context Western coal becomes very important. According to the Project Independence Report most of the country's reserves of low sulphur coal are to be found in the West. (p. 103). The report shows that Northern Appalachian reserves are 66.1 billion tons. The mean sulphur content (per cent of weight) of this coal is 2.0 which greatly exceeds the per cent of sulphur of that coal required to meet SO₂ new source performance standards, 0.72. For Southern Appalachia the reserves are 38.9 billion tons with a mean sulphur content of 1.0 per cent, also over the 0.72 per cent mark needed; and Midwestern reserves are 104.5 billion tons with a mean sulphur content of 3.1 per cent, also well over the required sulphur mark for that coal of 0.66 per cent. On the other hand, there are 175.4 billion tons of Great Plains reserves with a mean sulphur content of 0.5 per cent, which meets the relevant sulphur requirement of 0.51 per cent. The per cent of sulphur which is required to meet the SO₂ standards varies because the heat content of the coal varies. (Re-

port, p. 104). These figures clearly show the importance of Western coal.

The low sulphur content of Western coal has made it highly attractive to utilities. The National Electric Reliability Council's Review shows that "utilities in six of the nine reliability regions [which cover the entire contiguous United States] are making major commitments for the use of abundant low-sulphur Western coal." (p. 5).

"Exploring Energy Choices, A Preliminary Report" of the Energy Policy Project of the Ford Foundation (1974) agrees that "most Western coal has a low sulphur content and therefore appears attractive for meeting air quality standards, even for use in Midwestern and Eastern power plants." (p. 24).

Since this coal is produced through surface mining a problem of reclamation results. However, the study continues:

"An EPP-sponsored study by the National Academy of Sciences points out that in many parts of the West where rainfall is less than ten inches annually and where soils cannot retain moisture, reclamation is not feasible. The study concludes that if the best available technologies were applied, stable revegetation could likely be established in certain areas which are favored with good soil and adequate rainfall. Favorable conditions appear to exist in the mixed grass region of the Northern Great Plains." (p. 24-25).

In addition to the fact that it contains relatively little sulphur, Western coal fulfills another requirement of the growing electric industry. Due to economies of scale the growth in the electric industry is

concentrated in large new power plants. These new plants are often 800 MW, 1,000 MW, or even 1,500 MW. These plants require enormous amounts of coal. A 1,000 MW plant uses approximately 2,500,000 tons of Eastern or 3,000,000 tons of Western coal annually. At the present time, in order to secure the necessary financing the builder must be able to demonstrate a guaranteed source of coal for the life of the plant, typically 30 years. The only practical way to do this is to contract with a coal company to provide the coal for the life of the plant. To make such a contract the coal company must have the necessary 90,000,000 tons in the ground. There are very few such areas in the East. Thus coal for most new coal fired plants will have to come from the West.

Since Northern Great Plains coal is recoverable by surface mining techniques, it can be mined much more efficiently. The advantages are not just in cost, but also in the percentage of the deposit which can be mined. In surface mining operations 90 per cent of the coal can be removed by conventional methods, but only about 50 per cent can be removed by current underground techniques. (Project Independence Report, p. 103).

All these factors demonstrate the urgent need for the development of our coal resources, and in particular Northern Great Plains coal. Another factor must be mentioned, that of time. We must proceed quickly or our energy demand will outstrip our capacity to provide it. It takes three years to start up a large surface coal mine and five years for an underground one. (Zarb Affidavit, p. 4). The lead time necessary for a large coal-fired power plant is five years (Report, p. 69). In addition, large amounts of capital

must be gathered, the coal industry will need \$15.4 billion in the next 10 years. (Zarb Affidavit, p. 4). While everything takes time, very little can be done until the source of coal is guaranteed. Should this Court affirm the judgment below and impose an injunction affecting the development of Northern Great Plains coal, the resulting delay in development of such coal could be several years. Preventing the use of Northern Great Plains coal, with its unique combination of abundance, low sulphur content, accessibility, and compatibility with reclamation can only have a devastating effect on the electric industry and the national goal of energy self-sufficiency.

Each of the *Amici* fully supports an aggressive, effective environmental protection program. Certain of their members have taken the lead in cooperating with environmentalists in developing effective programs to harmonize strip mining and electric power generation with sound standards of environmental protection.

The *Amici* agree that the Interior Department has the responsibility in passing upon proposed mining plans to insist upon the most effective practical environmental protection measures. They believe that the Interior Department is doing this. They agree that Interior should prepare site-specific environmental impact statements and, where appropriate, broader impact statements such as the Eastern Power River Coal Basin Impact Statement.

However, the Court of Appeals, in attempting to force the government to engage in regional planning of an area determined not by the government but by the respondents, has opened the door to a dangerous situation. Under the opinion of the Court of Appeals,

anyone with an interest in a vaguely-defined area of the country could bring a halt to unrelated governmental activities, merely on the basis of geographical location within a self-defined province, until a provincial environmental impact statement has been issued and its adequacy judicially determined. This could be accomplished without bothering to challenge the adequacy of impact statements covering related regions within the area. Just as many members of the *Amici* were hindered in their efforts to obtain necessary fuel and energy by the injunction, so too may every member, wherever located, be injured in the future by similar challenges.

What makes these future roadblocks so difficult to foresee, and thus plan for, is their arbitrary nature. The requirement of impact statements for inter-related projects can be understood, and therefore taken into account during planning. That requirement is reasonable and causes no problems for the *Amici*. Indeed they encourage such environmental planning. However, no amount of foresight could have predicted the need for a provincial impact statement for the Northern Great Plains, especially in view of the Proposed Federal Coal Leasing Program and Eastern Powder River Basin Impact Statements. Decisions on sources of fuel and energy must be made years in advance in order to insure their availability. In allowing private individuals to determine the boundaries for provincial impact statements the court below has introduced a wild card into the deck which could appear at any time, without warning, to prevent these publicly and consumer-owned utilities, as well as investor-owned utilities, from providing electric power to the people they serve. It must not be overlooked that the parties who will suffer the greatest harm if the judgment of the

Court of Appeals is allowed to stand are the millions of ultimate electric consumers in the nation: residential, farm, commercial and industrial.

III. CONCLUSION

For the foregoing reasons and those presented in the briefs of the Federal and Intervening Petitioners, and other *amici* the judgment of the Court of Appeals should be reversed.

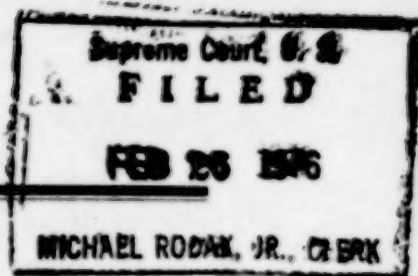
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**BRIEF OF THE CARTER OIL COMPANY
AS AMICUS CURIAE**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

Nos. 75-552 and 75-561

THOMAS S. KLEPPE, *et al.*, *Petitioners*,
v.
SIERRA CLUB, *et al.*, *Respondents*.

AMERICAN ELECTRIC POWER SYSTEM, *et al.*, *Petitioners*,
v.
SIERRA CLUB, *et al.*, *Respondents*.

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THE INTEREST OF THE AMICUS CURIAE

The Carter Oil Company ("Carter"), having obtained consent from each party, submits this brief as *amicus curiae* in support of the position of the peti-

tioners.¹ The basic facts underlying Carter's interest in this litigation are as follows.²

For more than eight years Carter has been working to develop a major coal-mining enterprise in the Eastern Powder River Coal Basin of Wyoming. In 1967 the United States Department of the Interior held a competitive lease sale covering, among other land, a tract of some 5,400 acres in Wyoming, on which the high bid of over \$900,000 was submitted on Carter's behalf. (Federal Coal Lease W-5036) Carter subsequently either purchased or obtained options to purchase all surface land overlying the lease (except for approximately 40 acres that is public domain land) and in April 1973 submitted to the Department of the Interior a plan for the mining of the coal resources of the lease and for reclamation of the lands subsequent to mining. The Department of the Interior prepared and issued on October 18, 1974, a six-volume Final Environmental Impact Statement for the Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming. The adequacy of that impact statement has not been challenged in any judicial proceeding. Part IV of that final statement consists of a 173-page analysis of the environmental consequences of the Carter mining and reclamation plan. Carter signed a 30-year sales contract on January 17, 1974 with a

¹ Copies of Carter's requests for the consent of each party to the filing of this brief, and the affirmative replies thereto, have been filed with the Clerk of this Court.

² Carter's interest is described in further detail in its *amicus* brief filed in this Court on October 16, 1975 in support of the petitions for writs of certiorari and in the Affidavit of Harry Pistole, President of Carter, filed in the Court of Appeals on October 30, 1975 in support of petitioners' motion to dissolve the injunction.

major electrical utility company, under which Carter is called upon to deliver five million tons of low-sulphur coal per year from this lease, with deliveries scheduled to begin in mid-1976. By virtue of delays occasioned by the Court of Appeals' injunction, that delivery date cannot possibly be met.

In aid of its proposed mining operations Carter has commenced extensive construction of off-lease surface facilities for site preparation costing, through July 31, 1975, approximately \$8,200,000. Through that date, Carter's total expenditures in furtherance of the proposed operation have amounted to approximately \$12,800,000, and an additional \$11,200,000 is contractually committed for the coming two years.

The injunction entered by the Court of Appeals has totally disrupted Carter's project at a very substantial cost, both in terms of money and in terms of relations with equipment suppliers, employees, customers, and ultimate consumers of electrical energy. Any additional delay in the project will compound the problems encountered by these affected persons.

ARGUMENT

Carter adopts the arguments of the Federal petitioners and the intervenors in support of reversal of the judgment of the Court of Appeals and reinstatement of the judgment of the District Court.

In dismissing respondents' complaint, the District Court concluded that the Secretary of the Interior was not obliged under NEPA to prepare an environmental analysis of all possible coal development which might or might not occur in future years over a four-state area in the western United States. The basis for the

court's decision was that there existed no area-wide federal proposal or plan relating to such possible development; hence there was no proposal on which an environmental impact statement could be written. (Pet. 75-552, App. D, 85A-101A) See 42 U.S.C. § 4332(2) (C). The Court of Appeals accepted the District Court's findings, and indeed specifically noted respondent's concession that no region-wide proposal existed for the four-state area. (*Id.*, App. A, 27A) The Court of Appeals nevertheless reversed the District Court and ordered the Secretary to reconsider his decision not to prepare an impact statement on a region-wide program that does not exist.

This decision was clearly erroneous and is a most unfortunate precedent for the proper administration of the National Environmental Policy Act. As this Court has stated, in "order to decide what kind of environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R. R. v. SCRAP*, 422 U.S. 289, 322 (1975). Thus an impact statement can intelligently be prepared only *after* a federal proposal has been formulated, and not before. 422 U.S. at 320. Otherwise the impact statement would be dealing with speculation. This seemingly obvious point is particularly applicable in the present case. No truly coherent or useful impact statement could be written on all the possible forms and varieties of coal development which might or might not occur in the Northern Great Plains area in future years, since the course of that development will depend on a myriad of factors as yet unknown, including the actions of state and local governments and applications for federal approvals to be filed by private parties.

This is not to say that development should be disorderly or that planning should not occur. The record in this case demonstrates that the federal petitioners, with the cooperation of private parties and affected local and state governments, have undertaken extensive resource studies and planning efforts on a variety of levels and concerning a variety of geographic areas. And with respect to the Eastern Powder River Coal Basin, the Secretary in a massive joint impact statement has analyzed the pending mining and reclamation plans and related applications of a number of private parties centering in that area. His decision to proceed with that impact statement was eminently reasonable. Yet respondents contend that because the Secretary has also undertaken other environmental studies, it is now necessary to penalize the entire national effort to develop additional energy resources by requiring a halt to all new development of federal coal in the four-state area until yet another and necessarily speculative impact statement for the four-state area is prepared. The Court of Appeals' endorsement of that contention is a crippling decision, not just for the development of the nation's energy resources but also for many unrelated programs of other departments and agencies of the federal government.

The impact of that decision on Carter has been very serious. For more than eight years Carter has been working to begin operations of a coal mine in Wyoming, including the expenditure of enormous effort and millions of dollars to develop and initiate an environmentally sound mining and reclamation plan, ~~on~~ which basis the Department of the Interior has prepared an unchallenged 173-page analysis of Carter's proposal as part of the final impact statement cover-

ing a 4,978,560-acre area. It is imperative that Carter now be permitted to proceed. Further delays would work a serious hardship upon the company, its employees, its customers who are in need of low-sulphur coal, and upon a wide segment of the general public. The ability of American industry to help meet the energy needs of this country has been substantially impaired by the decision below without adequate justification. Accordingly, the erroneous application of NEPA by the Court of Appeals should not be permitted to stand.

CONCLUSION

Carter, as *amicus curiae*, urges that the judgment of the Court of Appeals be reversed and the case remanded with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND
BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON
BEHALF OF PACIFIC LEGAL FOUNDATION**

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SUPPORT OF APPELLANTS ON BEHALF OF
PACIFIC LEGAL FOUNDATION**

This motion of the Pacific Legal Foundation for
leave to file the annexed brief *amicus curiae* is re-

spectfully made pursuant to Rule 42, consent to the filing of a brief having been granted by counsel for eleven of the appellants, while five of the appellants and the appellees have not responded, and therefore consent is deemed denied. All responses have been lodged with the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation believes the action of the court below in enjoining coal leasing in the Northern Great Plains until a regional environmental impact statement is prepared or a negative declaration is filed will seriously and adversely affect the general welfare of the people of this nation. This ruling is squarely in conflict with that of this Court in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975), and with a number of federal circuit court decisions.

Pacific Legal Foundation considers this case extremely significant and believes that serious consequences will occur if this overly broad decision is not reversed. First, the lower court's decision requires the

preparation of environmental impact statements at the regional level which is a redundant exercise that is not required by the National Environmental Policy Act. Second, as a practical matter, the decision causes further needless delays in the development of critically needed low sulfur coal reserves of the Northern Great Plains.

Pacific Legal Foundation believes that the magnitude of this issue must be fully developed, and to aid this development requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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**BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS
ON BEHALF OF PACIFIC LEGAL FOUNDATION**

INTEREST OF AMICUS

The interest of *amicus* is set out in the preceding motion to file this brief.

OPINION BELOW

The United States Court of Appeals, District of Columbia, in an opinion reported at 514 F.2d 856 (D.C. Cir. 1975), declared that the National Environmental Policy Act required the preparation of either a regional environmental impact statement for the Northern Great Plains or the preparation of a negative declaration since the government's role in the development of coal in that region had attained the posture of a "contemplated" program. The court enjoined further leasing of federal lands for mining coal until compliance with its order.

INTRODUCTION

The central question is whether the National Environmental Policy Act¹ (hereinafter NEPA) mandates the preparation of a program environmental impact statement (hereinafter EIS) for a region even though no proposal for federal action exists for that region.

To dictate to federal decision makers the contents, scope and geographical areas that should be covered by planning programs and EIS's strips them of their

¹42 U.S.C. § 4321, *et seq.* (1970).

authority and arbitrarily imposes comprehensive planning obligations when no federal action is proposed. This is contrary to NEPA and the decision of this Court in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) (hereinafter *SCRAP II*), but more it would squander limited resources on speculative endeavors and, in the opinion of dissenting Judge MacKinnon, paralyze the federal government.

The broader question, in light of the manner in which NEPA has been judicially interpreted, is whether NEPA's purpose is being lost in a blizzard of paper work and litigation with resulting costly stoppage and delays in essential programs.

NEPA was enacted for the purpose of facilitating agency decision making and not for the purpose of paralyzing the federal government. Unless it is rationally applied there will be disproportionate and unproductive expenditures of resources on planning rather than actual performance. To impose another useless layer of statements, such as the presently considered regional EIS's, will result in such unproductive expenditure and needless costly delay.

ARGUMENT

I

NEPA MUST BE REASONABLY CONSTRUED AND APPLIED OR ITS PURPOSE WILL BE FRUSTRATED

NEPA declares that it is the "policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and

promote the general welfare, to create and maintain conditions under which man and nature can exist in *productive harmony*, and *fulfill the social, economic, and other requirements of present and future generations of Americans.*" 42 U.S.C. § 4331(a) (emphasis added).

To achieve this purpose, NEPA mandates the consideration of environmental factors in decision making "along with economic and technical considerations." 42 U.S.C. § 4332(2)(B).

The keystone of the law is a balancing of all relevant factors so that a reasoned decision will be reached. Indeed, a rule of reason must prevail for as was so well stated in *Maryland-National Capital Planning Commission v. Schultz*, Civil No. 255-72 (D.D.C. May 11, 1973):

"NEPA 'must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.' *NRDC v. Morton*, *supra*, 837. Otherwise the statute, which was intended to ensure the consideration of environmental consequences in the performance of government activities will become perverted into a convenient roadblock to throw in the path of any—even worthwhile—project with which a citizen disagrees."

To require a regional environmental statement where no program exists is totally unreasonable. The preparation of such theoretical documents would squander limited resources and paralyze government.

An infinite number of geographic or generic inter-relationships can be found among the various federal projects throughout the country, and different litigants might seek to incorporate the same project into a myriad of different programs for planning purposes. In addition, the use of NEPA to impose a comprehensive planning duty on an unwilling agency as a means of forcing preparation of a comprehensive impact statement would intrude unduly on agency discretion and involve the courts to an unacceptable extent in the day-to-day business of running the government.

Or, as was stated by Judge MacKinnon in his dissent in this case, imposition of such a comprehensive planning obligation *would paralyze the federal government*,² and Congress, in passing NEPA, clearly did *not* have such a requirement in mind.

In addition, such a requirement is redundant. It must be emphasized that the Department of the Interior recognizes its environmental responsibilities. It has undertaken a national coal leasing program which includes the Northern Great Plains (hereinafter NGP) Region as defined by the respondents.³ On September 19, 1975, the Department issued a Final Environmental Impact Statement on this program. Respondents should look to this comprehensive document for treatment of the NGP and if they feel the

²*Sierra Club v. Morton*, 514 F.2d 856, 892 (D.C. Cir. 1975).

³United States Department of the Interior: News Release, *New Federal Coal Leasing Policy To Be Implemented Under Controlled Conditions*, January 26, 1976.

"area" has not been adequately assessed, they may judicially question the adequacy of the national programmatic EIS.

The Department also has and shall issue specific EIS's on individual leases or mining plans before approving such.⁴ The specific site or mining plan EIS may be evaluated and challenged if its scope does not incorporate relevant cumulative development.

In addition, the Department has and will prepare impact statements for areas of intermediate size assessing coal development and cumulative environmental impact of related developments in that area, the definitional criteria being basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors.⁵

Obviously, the Department is better equipped to evaluate these criteria and to make a reasoned, analytical determination of when a separate EIS is needed for an area of intermediate size. Such is an administrative function which must be left to the expertise of trained decision makers.

⁴United States Department of the Interior, *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program* at 1-4 (September 19, 1975); *Sierra Club v. Morton*, *supra* n.2 at 885.

⁵*Final Environmental Impact Statement: Proposed Federal Coal Leasing Program*, *supra* n.4 at 1-4.

II

NEPA DOES NOT COMPEL THE GOVERNMENT TO DEVELOP A REGIONAL EIS WHEN IT HAS NO PROGRAM FOR THE REGION

Section 102(2)(c) of NEPA (42 U.S.C. § 4332(2)(C)) requires an EIS for every "recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment."

In *Aberdeen & Rockfish R. Co. v. SCRAP*, *supra* at 322, this Court held:

"In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken."

It thus logically follows that if no federal action of regional scope is being taken no EIS is required. Such is the case here.

The circuit court did not disturb the district court's findings that there was *no* existing federal program or proposal calling for regional development. Regardless, the circuit court held that certain facts indicated the government "contemplated" regional development requiring an EIS. The EIS was compelled because such "*must precede*" the "recommendation or report on *proposals* for . . . major federal actions." *Sierra Club v. Morton*, 514 F.2d 856, 879 (D.C. Cir. 1975).

~~This is not the holding of this Court in *SCRAP II* for this Court stated:~~

~~"NEPA provides that such statement . . . shall accompany the *proposal* through the existing agency review processes."~~

"[T]he time at which the agency must prepare the final statement is the time at which it makes a recommendation or report on a *proposal* for federal action." *SCRAP II*, *supra* at 215.

The Department has not "proposed" "major federal actions" which require the preparation of an EIS covering all coal related development in the Northern Great Plains Region. Private lease applications are being considered by the Department, but they do not constitute a regional proposal. Neither does the Northern Great Plains Resources Program. This research study was initiated by past Interior Secretary Morton to assess potential social, economic and environmental impacts that development of the NGP Province would cause.⁶ The study's purpose was quite similar to the Southwest Energy Study, discussed in *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1279 (9th Cir. 1973). There the study "was designed to evaluate the problems created by further development of coal fired electric power in the Southwest." The Ninth Circuit ruled that the EIS's of these individual power plants did not require an EIS for the region defined in this study.

There being no regional program—no proposal for federal action—NEPA plainly does not require an EIS.

⁶*Sierra Club v. Morton*, *supra* n.2 at 863, 889.

III

INDIVIDUAL EIS's ON EACH LEASE FULLY SATISFY THE PURPOSES OF NEPA

The Department of the Interior has and shall issue EIS's on individual leases and mining plans before granting approval to proceed with their operation.⁷ Each such lease and EIS stands on its own. Each has independent significance and utility. Each satisfies NEPA by fully evaluating the project and its environmental impact.

Because each is a separate viable entity it should be examined on its own merits. It is not a mere component or increment of a regional program and it would be an error to make it an "evidentiary hostage" of a nebulous and undetermined regional program. This is consistent with recent well reasoned decisions in various circuits.

In *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974), the court was confronted with the two phased Teton Basin Project. The principal facilities planned under Phase I were a dam and reservoir. This phase of the project was to be constructed regardless of whether Phase II was ever determined feasible and consequently implemented. The court, in distinguishing these facts from cases relied on by the proponents of a broader scoped EIS, commented:

"The appellants contend that the EIS is fatally inadequate because it does not discuss the environmental impact of the Second Phase. They

⁷See environmental impact statements prepared for Westmoreland Mine and Peabody Coal Company project.

rely upon cases which hold that a series of inter-related steps constituting an integrated plan must be covered in a single impact statement. [Footnote omitted.] We believe these authorities are inapposite and that the failure of the EIS to discuss the Second Phase does not render it inadequate. The distinction between those situations in which it has been held that the EIS must cover subsequent phases and that before us is that here the First Phase is substantially *independent* of the Second while in those in which the EIS must extend beyond the current project, that project was dependent on subsequent phases. The dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken. [Footnote omitted.] This is not the case here." *Id.* at 1285 (emphasis added).⁸

The analogy to the present case is pure. The development of coal on specific sites in the so-called Northern Great Plains Region is not dependent on subsequent leases and mining plans within the area. The individual leases are independent of NGP's Region and their utility and significance relies on no peripheral coal development or secondary development of the region. Therefore, an EIS on the lease or mining plan, considering local cumulative development, completely satisfies NEPA.

The Tenth Circuit in *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974), held the Strawberry Aque-

⁸See also *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir. 1973); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973).

duct and Collection System to be an "independent" major federal action in spite of the fact that it was one of six planned subunits of the Bonneville Unit, which in turn was one of six units of the Central Utah Project—a water collection, development and diversion plan. The court ruled:

"Such system can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project. . . . [T]he Strawberry Aqueduct and Collection System . . . delineate a reasonable and logical segment . . . for discussion and analysis of the environmental impacts resulting therefrom. . . ." *Id.* at 791.

Thus again the "independent utility" of the unit subjected to judicial scrutiny was determinative of the scope of the applicable EIS.

"* * * So long as each major federal action is undertaken individually and not as an indivisible, integral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. . . . [S]uggestion that there is need for a comprehensive study . . . should be made to Congress, and not to the Court." *Id.* at 792.⁹

It is clear that the facts of the case at hand disclose leases and mining plans which are independent of alleged *contemplated* regional development. They can be and should be independently evaluated with separate EIS's for this will best achieve the purpose of NEPA.

⁹See also *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

Despite this persuasive body of well reasoned decisions, the circuit court held in the case under review that major federal actions can be combined to create a new major federal action for which a separate EIS is necessary.¹⁰ The authorities are *Scientists' Inst. For Pub. Info., Inc. v. Atomic Energy Com'n*, 481 F.2d 1079 (D.C. Cir. 1973) (hereinafter *SIPI*), and *Conservation Soc. of S. Ver., Inc. v. Secretary of Tran.*, 508 F.2d 927 (2d Cir. 1974) (hereinafter *Conservation Society*). These cases require an EIS which covers more than the individual project when an *irretrievable commitment of resources* beyond what was actually expended on the individual project occurs.

In *SIPI*, each development of the Liquid Metal Fast Breeder Reactor Program made future abandonment of the program and the resources invested in favor of an alternate energy strategy less likely. In *Conservation Society*, construction of a 20-mile segment of highway would generate traffic and thus create pressure for further construction along the entire route and foreclose consideration of alternatives to highways. Program EIS's were consequently required, a result with which *amicus* has no objection. But, the distinction of these above potential "regional" developments with that of the instant case is clear. As dissenting Judge MacKinnon observed:

"*SIPI* and *Conservation Society* found that a federal action at one point in the 'region' would cause a ripple effect which would eventually have an impact on future federal actions elsewhere in

¹⁰*Sierra Club v. Morton*, *supra* n.2 at 877-878.

the 'region'." *Sierra Club v. Morton*, *supra* at 888.

Thus where the only irretrievable resource commitments are those directly associated with the individual project, an EIS covering that project is adequate to enable the agency to act and necessarily fully satisfies NEPA. See also *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975); *Chelsea Neighborh'd Ass'ns v. United States Post. Serv.*, 516 F.2d 378 (2d Cir. 1975); *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975).

It again is clear that the facts of the case under review describe coal leasing which will not cause a "ripple effect" in the Northern Great Plains. The facts are devoid of any commitment of regional resources which would justify the circuit court's ruling. Therefore, a separate EIS for each lease or mining plan completely satisfies the spirit of NEPA.

The Program Statement and the Site Specific Statements supply extensive and certainly ample information on the environmental ramifications of the "appropriate" proposed federal action to allow informed and reasoned decision making. The goal of NEPA is just this and is not to subject economic progress to the rigors of unnecessary, redundant EIS preparation. The EIS's currently prepared satisfy the spirit of NEPA. If this is disputed, the adequacy of a particular EIS may be challenged, but to require an extra EIS layer which provides no added input and only slows the persistent pace of progress merely

allows disgruntled individuals to temporarily block its certain path at great expense to the general public.

Apart from the sheer nonexistence of substantive authority within NEPA such an approach also is an undue intrusion into agency discretion and inappropriately involves the court in the day-to-day business of government. Deference must be given to administrative decisions¹¹ and at such a level courts may intervene only if there is a finding that the agency is acting arbitrarily and capriciously.¹² There certainly was no such finding in the case under review. Indeed, in view of the environmental concern shown coal leasing on the local level and national level by the Department of the Interior, such a finding is not possible. Again the Court must deliver the clear message that it is not a judicial function to dictate the future programs in which an executive department must engage. This is an executive decision and must remain separate and distinct.

¹¹See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975).

¹²5 U.S.C. § 706(2)(A):

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"

CONCLUSION

The critical need for development of America's coal reserves is irrefutable. The Department of the Interior recognizes this need but also recognizes that this need cannot run roughshod over the need to protect our environment. The Department has developed a national coal program whereby environmental protection has been extensively considered in its decision making. NEPA has been fully satisfied by the format of preparing a National Programmatic EIS and site specific EIS's. It is obvious that a third EIS layer regarding some region, as selected by private parties through undefined parameters, will provide no increase in environmental protection. The third layer EIS is *not* required by NEPA and will serve only to further retard the development of crucially needed low sulfur coal.

America is nearing an energy crisis but may have no ability to fend it off, should this decision stand. The Pacific Legal Foundation as *amicus curiae* therefore urges the decision of the court of appeals to be reversed and the case to be remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

VS.

SIERRA CLUB, et al.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
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VS.

SIERRA CLUB, et al.

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF OF 22 NAMED STATES AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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IN THE
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OCTOBER TERM, 1975

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THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, et al.,
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SIERRA CLUB, et al.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF 22 NAMED STATES AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI CURIAE

The interest of the States upon whose behalf this brief is submitted is not in the merits or demerits of coal development in the Northern Great Plains. Amici states are vitally interested in the Court's disposition

of the substantive issue—interpreting the National Environmental Policy Act (NEPA). The states are interested in NEPA for two reasons:

1. NEPA provides the primary means by which the States can be informed about and can affect what the Federal Government is doing to the environment of the States.

2. Approximately half the States have laws or administrative regulations patterned on NEPA. This Court's construction of the Federal law will affect the construction of the State laws patterned upon it.

These interests are more extensively described in the body of the argument.

SUMMARY OF ARGUMENT

The National Environmental Policy Act provides the primary means by which the States can be informed about and can affect what the Federal Government is doing to the environment of the States. Amici States respectfully pray that the decision of this Court recognize the importance to States of the environmental impact statement created by Congress in NEPA. They further wish to emphasize the importance of the "program environmental impact statement," a conspicuous example of which is the subject of this case. It is through this beneficial tool that States can become informed about the cumulative effect of massive Federal actions within the States, enabling the States to participate effectively in the

commenting and decision-making process concerning what the Federal Government is doing to the environment of the States.

In addition, approximately half of the States have laws or administrative regulations patterned on NEPA. This Court's construction of the Federal law will affect the construction of the State laws patterned on it.

ARGUMENT

I.

NEPA PROVIDES THE PRIMARY MEANS BY WHICH THE STATES CAN BE INFORMED ABOUT AND AFFECT WHAT THE FEDERAL GOVERNMENT IS DOING TO THE ENVIRONMENT OF THE STATES.

A. The National Environmental Policy Act.

The National Environmental Policy Act contemplates a major State role in its implementation. 42 U.S.C. 4321-4347. "[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . 42 U.S.C. 4331(A)."¹ This policy, in

¹NEPA supplements existing agency authority with respect to the national environmental policy. In the words of the Council on Environmental Quality's Guidelines (discussed, *infra*, at paragraph I. D.):

"Section 102(2)(C) of the Act applies to all agencies of the Federal Government. Section 102 of the Act provides that to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and section 105 of the Act provides that the policies

which States are to cooperate, is implemented by various "action forcing" devices, chief among which is the "environmental impact statement" mandated by section 102(2)(C) (42 U.S.C. 4332(2)(C)). President's Council on Environmental Quality, *Environmental Quality—Third Annual Report*, 222-228 (1972); See *Calvert Cliffs v. A.E.C.*, 449 F.2d 1109, 1113 (D.C. Cir. 1971); *Greene County v. F.P.C.*, 455 F.2d 412, 415 (2d Cir. 1972) cert. den. 409 U.S. 849 (1972); *E.D.F. v. Corps of Engineers*, 470 F.2d 289, 294, n.8 (8th Cir. 1972). The environmental impact statement must be circulated to "State . . . agencies, which are authorized to develop and enforce environmental standards" for their "comments and views" which must then "accompany the proposal through the existing agency review processes." 42 U.S.C. 4332(2)(C). NEPA contemplates Federal-State cooperation in the preparation of certain kinds of environmental impact statements. 42 U.S.C. 4332(2)(D). "[A]ll agencies of the Federal Government" are required by the Act to "make available to States . . . advice and information useful in restoring, main-

and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal Agencies. This means that each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. In accordance with this purpose, agencies should continue to review their policies, procedures, and regulations and to revise them as necessary to ensure full compliance with the purposes and provisions of the Act. The phrase 'to the fullest extent possible' in section 102 is meant to make clear that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. 1500.4 (a).

taining, and enhancing the quality of the environment" 42 U.S.C. 4332(2)(G). The President is charged with reporting annually to the Congress on, inter alia, "a review of the programs and activities . . . of . . . State . . . governments . . . with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources" 42 U.S.C. 4341. The agency created by and given primary responsibility for implementing NEPA, the Council on Environmental Quality (CEQ) is directed to consult with State governments. 42 U.S.C. 4345(1).

B. The Environmental Quality Improvement Act.

Several months after the enactment of NEPA the Congress passed the Environmental Quality Improvement Act of 1970. 42 U.S.C. 4371-4374. That Act did two things. It declared the existence of a "national policy for the environment" (42 U.S.C. 4371)² and it provided administrative support for the Council on Environmental Quality (42 U.S.C. 4372). It is the first of those purposes that concerns us here, for the Congress has placed "primary responsibility" for implementing the "national policy" on the States and their political subdivisions:

"(b)(1) *The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes*

²See *Citizens to Preserve Overton Park, Inc., et al., v. Volpe*, 401 U.S. 402, 404, (1971); *E.D.F. v. T.V.A.*, 468 F.2d 1164, 1173-1174 (6th Cir. 1972); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic development.

"(2) *The primary responsibility for implementing this policy rests with State and local governments.*" 42 U.S.C. 4371. [Emphasis added.]

C. The President's Executive Order.

The Executive Order of the President which implements NEPA further stresses the role of the States. Executive Order No. 11514, 3 C.F.R. 271, see 42 U.S.C. 4321 (1970).³ Heads of Federal agencies are mandated to consult with appropriate State agencies in "carrying out their activities as they affect the quality of the environment." *Id.*, §2(a). Federal agencies are to encourage State agencies to inform the public concerning their activities affecting the quality of the environment. *Id.*, §2(b). Various kinds of information regarding "existing or potential environment problems" are to be made available to States. *Id.*, §2(c).

D. The Council on Environmental Quality's Guidelines.

CEQ's Guidelines, appearing in the Code of Federal Regulations, reinforce the States' role. 40 C.F.R. Part 1500. Those Guidelines are entitled to deference. See *Warm Springs Dam Task Force v. Gribble*, 417

³It is the Executive Order which charges the Council on Environmental Quality with issuing guidelines to all Federal agencies to implement the environmental impact statement process. The CEQ shall: "Issue guidelines to Federal Agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act." *Id.*, §3(h).

U.S. 1301, 1304-1310 (Douglas, Cir. J.); *N.R.D.C. v. Callaway*, 524 F.2d 79, 86 (2d Cir. 1975); *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079, 1092-1093 (D.C. Cir. 1973); *Greene County v. F.P.C.*, *supra*, 455 F.2d 412, 421 (2d Cir. 1972); *E.D.F. v. T.V.A.*, 468 F.2d 1164, 1178 (6th Cir. 1972). The Guidelines are addressed to State as well as Federal participants in the process. 40 C.F.R. 1500.1(a). State agencies are to be consulted by Federal agencies in the assessment of the "potential environmental impact" of Federal actions. 40 C.F.R. 1500.2. Indeed where Federal agencies lack the relevant expertise, they are encouraged to make appropriate use of State Agencies. 40 C.F.R. 1500.8(c). Draft environmental impact statements are to be circulated to State agencies. 40 C.F.R. 1500.2(b)(1). Those State agency comments are then to be considered by the Federal agencies. 40 C.F.R. 1500.2(b)(2); see 1500.7(a). The Federal agencies' final environmental impact statements are then to be "responsive to the comments received." 40 C.F.R. 1500.2(b)(3); see 40 C.F.R. 1500.10.

The Council specifies the procedures for the Federal-State cooperation. 40 C.F.R. 1500.3(a) and (c). More specifically, the Guidelines emphasize the importance of opportunity for early State (and other) reviewers' comments so as meaningfully to shape the ultimate decision. "It is important that draft environmental statements be prepared and circulated for comment . . . as early as possible in the agency review process in order to permit agency decision-makers and outside reviewers to give meaningful con-

sideration to the environmental issues involved." 40 C.F.R. 1500.7(a).⁴

In considering whether to hold a public hearing Federal agencies are directed to consider the "degree of interest" as evidenced by requests for a public hearing from, among others, State authorities. 40 C.F.R. 1500.7(d).

The environmental impact statement must address the relationship of the proposed Federal action to

⁴The entire subdivision of the section reads:

"(a) Each environmental impact statement shall be prepared and circulated in draft form for comment in accordance with the provisions of these guidelines. The draft statement must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements by section 102(2)(C). (Where an agency has an established practice of declining to favor an alternative until public comments on a proposed action have been received, the draft environmental statement may indicate that two or more alternatives are under consideration.) Comments received shall be carefully evaluated and considered in the decision process. A final statement with substantive comments attached shall then be issued and circulated in accordance with applicable provisions of §§1500.10, 1500.11, or 1500.12. It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful consideration to the environmental issues involved. In particular, agencies should keep in mind that such statements are to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made. This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process. For major categories of agency action, this point should be identified in the procedures issued pursuant to §1500.3(a). For major categories of projects involving an applicant and identified pursuant to §1500.6(c)(ii) as normally requiring the preparation of a statement, agencies should include in their procedures provisions limiting actions which an applicant is permitted to take prior to completion and review of the final statement with respect to his application." 40 C.F.R. 1500.7(a).

"land use plans, policies, and controls for the affected area." 40 C.F.R. 1500.8(a)(2). "This requires a discussion of how the proposed action may conform or conflict with the objectives and specific terms of approved or proposed Federal, State, and local land use plans, policies, and controls . . . for the area affected" *Ibid.* Where a "conflict or inconsistency" is shown, the EIS is to describe "the extent to which the agency has reconciled its proposed action with the plan, policy or control" and the "reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation." *Ibid.*

The Guidelines further provide the mechanism for State review of proposed Federal actions which may significantly affect the environment. 40 C.F.R. 1500.9(c); 40 C.F.R. Part 1500, Appendix IV; see 40 C.F.R. 1500.9(a). Basically the Office of Management and Budget Circular No. A-95 provide for using a series of State and areawide clearing houses ("A-95 review") to secure State and local views "which can assist in the preparation and review of environmental impact statements." 40 C.F.R. 1500.9(c); see 40 C.F.R. 1500.11(d). These procedures are described in detail in the joint OMB-CEQ memorandum attached to the Guidelines. 40 C.F.R. Part 1500, Appendix IV; see 40 C.F.R. 1500.9(c). The responsibilities of commenting agencies are also outlined. 40 C.F.R. 1500.9(e).

At the conclusion of the process the final environmental impact statement must respond to the comments that have been made (including State com-

ments). 40 C.F.R. 1500.2(b); 40 C.F.R. 1500.10(a). Copies of the final statement must then be sent to State agencies which made substantive comments on the draft statement. 40 C.F.R. 1500.10(b). Appropriate time limits are established to insure that in fact the opportunity for State (and other) input exists. 40 C.F.R. 1500.11(b).

In brief, Congress (1) has established a national policy for the environment; (2) has declared that primary responsibility for implementing that policy lies with States and their political subdivisions; (3) has provided the means (the environmental impact statement) for the States to assume that responsibility insofar as major Federal actions affect it; and (4) procedures have been established to facilitate that State role from the earliest part of the process until its ultimate implementation.

II.

THE IMPACT OF POTENTIAL FEDERAL PROGRAMS ON A STATE IS IMMENSE

The potential for Federal impact within a State is immense. The impact may or may not be desirable. If adverse, its severity may or may not be offset by competing national priorities. But the potential for impact is immense. One need only examine the record in this case to become aware of the pervasive effect in the directly affected States of a massive

Federal effort to develop coal.⁵ Similar potential for colossal impact in a geographic area is not uncommon in the development of resources. Off-shore oil drilling affects coastal areas in a comprehensive manner. Oil shale, coal gasification, the development and movement of petroleum and natural gas—all of these may affect and alter in a major way the areas where the development occurs. Such pervasive development may be the most significant determinant of how people in the affected areas live. The change occasioned by massive development in an area may represent a greater impact on the lives of the affected citizens

⁵The Council on Environmental Quality in its Sixth Annual Report suggests what may be some of the potential effects:

"NORTHERN GREAT PLAINS COAL

"A recent report, *Effects of Coal Development in the Northern Great Plains*, issued by the Northern Great Plains Resources Program, [footnote omitted] illustrates the regional nature of problems associated with coal development. The group concluded that secondary impacts—those resulting from the additional industrial and commercial development ancillary to the primary coal development projects—may well be the most significant impacts of developing the region's coal resources. Some other conclusions are:

- "The population increases attributable to coal development will be large compared to existing local populations
- "The rapid influx of population will increase demands for services
- "Public service requirements will increase at a much faster rate than revenue collection, especially in the early years of development
- "Three service areas are of particular concern—housing, health care, and education
- "Many Indian reservations will be affected by coal development, for some reservations contain considerable coal deposits and some of these lands have been leased
- "Coal development will accelerate the urbanization process that is occurring in the Northern Great Plains region." Council on Environmental Quality, *Environmental Quality* (Sixth Annual Report, 1975) 136-137; also see 640-646.

than the changes caused by the totality of all previous governmental actions in the area.⁶

A. How States Can Benefit From The Program EIS Process.

How can the States benefit from the program environmental impact statement process? First, they can become informed—the simple process of insuring that they are aware of what the Federal Government has in store for them. Second, they can insure that the Federal Government is itself informed—that before taking major actions which either separately or cumulatively significantly affect the environment the Federal Government has adequately discussed the consequences of its action.⁷ Problems are to be faced,

⁶By way of example of the sort of effects of concern to a State which are occasioned by cumulative Federal actions in one area of a State, we invite the Court's attention to a case in which the State of New York intervened as a party plaintiff:

"In recognition of Congress' purpose the CEQ Guidelines for preparation of impact statements emphasize that consideration should be given not only to the action that is the subject of the EIS but also to 'related Federal actions and projects in the area, and further actions contemplated' [emphasis added], 40 C.F.R. §1500.6(a), and direct that the 'interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects shall be presented in the statement,' 40 C.F.R. §1500.8(a). . . . The Navy's impact statement fails to meet this standard of comprehensive evaluation. It is clear that there are at least several other major federal and private dredging projects that are likely to produce colossal amounts of polluted spoil for disposal in this particular area of Long Island Sound. . . . The Navy's failure to consider these and possibly other proposed dredging projects in the New London area is an example of the isolated decisionmaking sought to be eliminated by NEPA." *N.R.D.C. v. Callaway*, 524 F.2d 79, 88-89 (2d Cir. 1975).

⁷A California Court interpreting a State equivalent of the EIS has termed it "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *County of Inyo v. Yorty*, 32 C.A.3d 795, 810, 108 Cal. Rptr. 377, 388 (Cal. Ct. of App. 1973).

not swept under the rug. *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *Russian Hill Improvement Ass'n v. Board*, 44 C.A.3d 158, 171, 118 Cal. Rptr. 490, 498 (Cal. Ct. of App. 1974); *People v. County of Kern*, 39 C.A.3d 830, 841, 115 Cal. Rptr. 67, 75 (Cal. Ct. of App. 1974). Third, the State may attempt to shape the Federal program,⁸ using administrative and even political or judicial means. Once the facts are clear (see *City of Davis v. Coleman*, *supra*, 521 F.2d 661, 676 (9th Cir. 1975)), the constructive interplay of National and State Governments that characterizes our Federal system may take place. Fourth, the State may itself plan in light of the prospective development. A potential massive impact may trigger a need for massive changes in infrastructure—such as highways, water resources, sewers, schools. NEPA is our tool—the one Federal law so pervasive as to cover every major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).

Again, the States which have signed this brief are not here asserting that proposed change is or is not desirable. They are not stating here that such development is or is not in the national interest. They are asking that the immensity of the Federal impact be recognized and that the States' tool for coping with it, the National Environmental Policy Act, not be construed in a manner which would deprive the States of a means for becoming informed about and par-

⁸A Washington Court has referred to the EIS requirement as "an attempt by the people to shape their future environment by deliberation, not default" *Byers v. Board*, 529 P.2d 823, 828 (Wash. S.C. 1974).

ticipating in the shaping of the programs that will affect them so massively.⁹ This implies, at minimum, two interrelated considerations, those of timing and of scope. In the first case States, in order effectively to participate in the NEPA process, must be able to have a say in the process at a sufficiently early stage so as meaningfully to affect the decision, whether that

⁹States participate as a matter of course in the cooperative administrative efforts described in paragraph I. D. of this brief. Among the instances where States or their political subdivisions have felt compelled to seek judicial enforcement of the Congressional mandate are: (States.) *Alabama ex rel. Baxley v. Woody*, 473 F.2d 10 (5th Cir. 1973); *Alpine Lakes Protection Society and Washington v. Schlappfer*, 518 F.2d 1089 (9th Cir. 1975); *Arizona Public Service Co., and State of California v. Federal Power Com'n*, 490 F.2d 783 (D.C. Cir. 1974); *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974); *Louisiana v. Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974); *Natural Resources Defense Council and State of New York v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235 (6th Cir. 1974); *Washington Utilities & Transp. Com'n v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975). *Alaska v. Kleppe*, 76-0368 (D.C.D.C.); *California, et al. v. Morton*, Civ. 74-2374-DWW (C.D. Cal.); *California v. Kleppe*, 75-1943 (D.C.D.C.); *Delaware v. Pa. N. Y. Cent. Trans. Co.*, 323 F. Supp. 487 (D. Del. 1971); *Illinois v. Butterfield*, 8 E.R.C. 1307 (N.D. Ill. 1975); *Izaak Walton League of America and State of Illinois v. Schlesinger*, 337 F. Supp. 287 (D. D.C. 1971); *New York v. Department of the Army*, 3 E.R.C. 1947 (S.D.N.Y. 1972); *Pennsylvania v. Morton*, 381 F. Supp. 293 (D. D.C. 1974); *Wisconsin v. Butz*, 389 F. Supp. 1065 (E.D. Wis. 1975); *Wisconsin v. Callaway*, 371 F. Supp. 807 (W.D. Wis. 1974). (Political Subdivisions.) *City of Boston v. Brinegar*, 512 F.2d 319 (1st Cir. 1975); *City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Greene County Planning Board v. Federal Power Com'n*, 490 F.2d 256 (2d Cir. 1973); *Port of New York Authority v. United States*, 451 F.2d 783 (2d Cir. 1971); *Scenic Hudson Preservation Conference and City of New York v. F.P.C.*, 453 F.2d 463 (2d Cir. 1971); *Borough of Morrisville v. Delaware River Basin Com'n*, 382 F. Supp. 543 (E.D. Pa. 1974); *City of North Miami, Florida v. Train*, 377 F. Supp. 1264 (S.D. Fla. 1974); *City of Romulus v. County of Wayne*, 392 F. Supp. 578 (E.D. Mich. 1975); *Port of Astoria v. Hodel*, 8 E.R.C. 1156 (D. Ore. 1975); *Tierrasanta Community Council and City of San Diego v. Richardson*, 6 E.R.C. 1065 (S.D. Cal. 1973).

decision is made consciously or by incremental nibbles.¹⁰ A role after decisions are already made ceases to be a vital one. The document then produced becomes a "post hoc rationalization." See *E.D.F. v. Coastsides County Water District*, 27 C.A.3d 695, 706, 104 Cal. Rptr. 197, 203 (Cal. Ct. of App. 1972); also see *Citizens to Preserve Overton Park Inc., et al. v. Volpe*, supra, 401 U.S. 402, 419-420 (1971). Second, scope diminishes with time. A virtue of the program EIS is the opportunity it affords for the examination of basic policies and the explorations of major alternatives.¹¹ Given the potential consequences of major Federal actions to states, these interrelated questions of timing and of scope become vital.

B. Significant Effect.

The Council on Environmental Quality's Guidelines provide some hint of the potential pervasiveness of Federal action. Much may significantly affect the environment.

"The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed,¹² related Federal actions and

¹⁰See *Loveless v. Yantis*, 513 P.2d 1023, 1029 (Wash. S.C. 1973).

¹¹In CEQ's words, "The EIS itself is intended to be, and often is, the tip of an iceberg, the visible evidence of an underlying planning and decisionmaking process that is usually unnoticed by the public." Council on Environmental Quality, *Environmental Quality*, supra, 628 (Sixth Annual Report. 1975).

¹²"NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration." *N.R.D.C. v. Callaway*, supra, 524 F.2d 79, 88 (2d Cir. 1975).

projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. In all such cases, an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. . . ." 40 C.F.R. 1500.6(a).¹³

C. Secondary Effects.

Among the consequences of Federal action it is often the secondary or indirect consequences which

¹³A purpose of NEPA and of its State progeny "is to avoid the adverse impact upon the environment which takes place when various phases of a project, or series of projects, are authorized by governmental agencies in a piecemeal fashion without regard to the cumulative impact of the total development." *Juanita Bay Valley Com. Ass'n. v. City of Kirkland*, 510 P.2d 1140, 1149 (Wash. Ct. of App. 1973).

are the most pervasive.¹⁴ As the CEQ Guidelines state:

"(ii) Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infra-structure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more sub-

¹⁴As stated by the Ninth Circuit:

"[T]he Council on Environmental Quality only recently pointed out, consideration of secondary impacts may often be more important than consideration of primary impacts. [Footnote omitted.]

'Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects these secondary or induced effects may be more significant than the project's primary effects.

'While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase.' *Fifth Annual Report of the Council on Environmental Quality*, 410-11 (December 1974). *City of Davis v. Coleman*, 521 F.2d 661, 676-677 (9th Cir. 1975).

stantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in §1500.8(a)(1) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question." 40 C.F.R. 1500.8(a)(3)(ii).

D. Program Environmental Impact Statements.

Often it is not a single, discreet project that by itself significantly affects the environment, but the sum of various such projects. Therefore the CEQ has provided in its Guidelines that in

"... many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area . . . or common to a series of agency actions . . . , or the overall impact of a large-scale program or chain of contemplated projects" 40 C.F.R. 1500.6(d)(1).¹⁵

CEQ's guidelines are both sensible and sensitive.

¹⁵See Council on Environmental Quality, *Environmental Quality* (Sixth Annual Report. 1975), *supra*, at 640-646.

III.

PROGRAM ENVIRONMENTAL IMPACT STATEMENTS ARE OF IMMENSE BENEFIT TO THE STATES AND NATION

A. What Are Program Environmental Impact Statements?

Program environmental impact statements are described in CEQ's Guidelines, excerpts from which were quoted immediately above:

"Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments). Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement." 40 C.F.R. 1500.6(d)(1).

Perhaps the most thoughtful explanation of what the program environmental impact statement has come to be is found in the work of the nation's leading authority on NEPA.¹⁶ By way of background we quote extensively from Anderson:¹⁷

¹⁶F. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (1973); F. Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law*, 238-419 (E. Dolgin and T. Guilbert, ed. West Pub. Co. 1974).

¹⁷Also see Council on Environmental Quality, *Environmental Quality* (Sixth Annual Report. 1975), *supra*, at 640-646.

"c. Programs, Policy, and overview statements

"After legislation is passed, an agency should not wait until specific projects are formulated before preparing additional impact analyses. Between the passage of new legislation and the final phases of its implementation, the agency will set the policies it intends to pursue, will select substantive and geographic emphases, and will usually promulgate detailed guidelines. For its older continuing programs, the agency will also want from time to time to evaluate its basic operational criteria. All of these actions are important candidates for NEPA impact statements.

"In view of the emphasis in NEPA's legislative history upon advance planning and prevention of decision making in cumulatively destructive increments, [footnote omitted] it is not surprising that the legislative history also expressly states that 'regulations, policy statements, or expansion or revision of ongoing programs' [footnote omitted] must be covered by impact statements. The basic decisions made in the early phases of program design have a greater potential for environmental harm than any one separate project decision at a later time. A 'program,' 'umbrella,' or 'overview' impact statement affords an occasion for more comprehensive consideration from an environmental point of view of basic policies, programmatic alternatives, geographic variations, cumulative impacts, overall effects of large-scale programs, and chains of proposed projects that can realistically take place in a statement on an individual action. [Footnote omitted.]

"When a new program is just beginning, the obvious course is for the agency to prepare state-

ments as various phases of the program unfold. The Department of the Interior, for example, appears to be following this course with exploratory development of oil shale, [footnote omitted] the National Recreation Plan, [footnote omitted] and geothermal steam development. [Footnote omitted.] The court in *Scientists' Institute for Public Information (SIPI) v. Atomic Energy Commission* [footnote omitted] imposed such a program statement requirement upon the research and development phase of the AEC's Liquid-Metal Fast Breeder Reactor Program (LMFBR). In addition to the LMFBR program, statements have been prepared on the research and development program for keeping the St. Lawrence Seaway open longer during winter with icebreakers, heat additives, and bubblers, [footnote omitted] and upon the saltwater desalting program. [Footnote omitted.] Such preparation is consistent with the basic thrust of *Natural Resources Defense Council v. Morton*. [Footnote omitted.]

"Program statements may usefully focus upon geographic regions as well. For example, statements have been prepared for the development of the Souris Red River and Rainy River basins in Minnesota, North Dakota, and South Dakota, [footnote omitted] on the Upper Mississippi River Basin Study, [footnote omitted] on the central Arizona Project, [footnote omitted] and on underground nuclear testing centered in Nevada. [Footnote omitted.]

"A draft statement prepared by the Department of Housing and Urban Development illustrates how impact statement preparation or program guidelines may influence agency policy at an early time. [Footnote omitted.] HUD is

preparing 'Minimum Property Standards, for the design and construction of agency-funded housing. The standards involve a comprehensive revision of acceptable physical criteria as detailed in a guidance manual several hundred pages in length. In theory the draft statement affords early leverage on problems associated with transportation, energy and aesthetics as they affect HUD programs.

"Litigation has touched upon program statements. Besides SIPI and *Natural Resources Defense Council v. Morton*, the court in *Conservation Society of Southern Vermont v. Secretary of Transportation* rejected project-by-project, segment-by-segment NEPA treatment of the overall plan to upgrade interstate Route 7 through Connecticut, Massachusetts, and Vermont. [Footnote omitted.] Citing SIPI, the court called for an overview of the interconnected impacts of the entire project. In *Sierra Club v. Froehlke*, the court required an overall assessment of the entire multi-phased Trinity River development project, as well as separate treatment of its components, including the Wallisville Dam, unless it could be shown that the Wallisville Dam could be justified on its local merits alone. [Footnote omitted.] *Natural Resources Defense Council v. Tennessee Valley Authority* the court accepted the TVA's program statement on its strip mined coal contracts and held further (in a more doubtful decision) that individual statements did not have to be prepared on separate, specific contracts. [Footnote omitted.] Finally, in *Minnesota Public Interest Research Group v. Butz*, the court held that the cumulative effect of all Forest Service decisions on timber management in the Boundary

Waters Canoe Area (BWCA) was 'major Federal action' and that the Forest Service had to prepare an impact statement on its overall BWPCA timber management plan. [Footnote omitted.]

"The Boundary Waters Canoe Area case illustrates how ongoing actions may be subjected to programmatic review. Other cases have touched upon this aspect of program or 'overview' statements. In *Lee v. Resor* the court held that NEPA applied to a 20-year-old Corps' program which used herbicides to control water hyacinths growing in the St. Johns River in Florida. [Footnote omitted.] Although preliminary injunctive relief was denied, the court held that it had jurisdiction to order the statement prepared while the spraying continued. The court's interpretation of NEPA's legislative history and purposes convinced it that the Corps' guidelines requiring that impact statements be prepared on all of its continuing programs within three years correctly interpreted the law. The court concluded its analysis of NEPA's legislative history by stating:

It would be ironic if Congress did not intend to affect those projects and agency decisions that provided the impetus for the Act. Congress doubtless intended that NEPA have some application to the type of situation presented here [footnote omitted]. [Footnote omitted.]

"Although the court in *Sierra Club v. Mason* [footnote omitted] found that the harbor dredging at issue in that case was a new major federal action with 'a life of its own' which began after NEPA's enactment, in dictum the court affirmed that NEPA was intended to apply to such a con-

tinuing agency program. The court apparently was not content to accept the Corps' designation of the project as ongoing maintenance, which would have required the Corps under its own guidelines to prepare a statement within three years of NEPA's enactment. The court viewed the guidelines as creating a temporary exception to NEPA's blanket applicability and refused to allow the project at issue to fall within it.

"In *New York v. Department of the Army*, a longstanding Corps program to dump sewage sludge and dredged spoil in the New York harbor area was challenged for lack of an impact statement. The Corps usually gathered the material to be dumped, but issued permits to private barge owners to dump it in Corps-designated areas. During litigation the Corps conceded NEPA's applicability by preparing an impact statement on the program. [Footnote omitted.]

"The numerous instances of program statements cited here should not be misinterpreted to mean that such statements are the rule, or that they are adequate in scope. According to CEQ, only about 50 each statements were prepared in the 17 month period before November 1973. [Footnote omitted.] The failure to prepare program statements has not often been litigated, because of the uncertainty about their scope. However, SIPI, may mark the turning point in this trend." F. Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law*, *supra*, note 16, at 335-338.¹⁸

¹⁸By way of discussion of this Court's recent decision in *Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 422 U. S. 289 (1975), we attach as

As Anderson notes, "... the failure to prepare program statements has not often been litigated, because of the uncertainty about their scope." *Id.*, at 338. The problem is not an easy one, as this case indicates.¹⁹ On the one hand a State bombarded with great numbers of individualized, site-specific statements which fail to assess their own cumulative impact is not particularly well served.²⁰ At worst, it is ad hocery proliferated.²¹ Conversely, a statement so broad that in discussing generalities on a national scale, it may fail to address the cumulative impact within a given State or region.

It is not our purpose to try to define the precise scope of a program or of a region. That will depend upon the facts of a given case. But we do suggest that to leave the definition of that scope solely to the

Appendix A the "Memorandum to the Heads of Agencies," of November 26, 1975, of the Council on Environmental Quality. See especially the "Conclusions" of the Memorandum. We see no inconsistency between this Court's holding in SCRAP II and the decision of the Court below in this case. A question in this case is whether a proposal exists.

¹⁹See *No Oil, Inc. v. City of Los Angeles*, 13 C.3d 68, 77, n.5, 118 Cal. Rptr. 34, 39-40, n.5, 529 P.2d 66, 71-72, n.5 (Cal. S.C. 1974).

²⁰This is not to say a site-specific EIS is not useful. It may well be exceedingly useful for exploring the effects of an action at a given site and alternatives to it. This is, however, something different from examination of the cumulative impact of many actions. See *Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975); *N.R.D.C. v. Morton*, 388 F. Supp. 829, 839-840 (D.D.C. 1974).

²¹The California Supreme Court has noted that the State's "little NEPA" requires that "environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." *Bozung v. Local Agency Formation Commission*, 13 C.3d 263, 283-284, 118 Cal. Rptr. 249, 263, 529 P.2d 1017, 1031 (Cal. S.C. 1975).

bureaucracy of the Federal Government will not necessarily serve the purposes of NEPA in any sort of decent fashion.²² The temptation to gerrymander the scope along the lines of least resistance is always present. We do not propose any sort of court-mandated Federal regional planning, but we respectfully suggest that if the Federal Government is going to do some things which will have the effect of massively altering the environment of the States, NEPA compels it to formulate some rational consideration of regional impacts. This will inform the States and the public, and they will be able effectively to participate in an informed manner in shaping the decisions which will affect them.

Further, a program environmental impact statement is a means of rationalizing and expediting procedures for applying NEPA. Once certain factors common to the program have been adequately analyzed, they need not be repeated and reexamined in each subsequent site-specific statement.

By way of informed and thoughtful resolution of the issue, we return to Anderson:

"In view of the emphasis in NEPA's legislative history upon advance planning and prevention of decision making in destructive increments, it is no surprise that the legislative history also expressly states that 'regulations, policy statements, or expansion or revision of ongoing programs' must be covered by impact statements. The basic decisions made in the early phases of

program design have a greater potential for environmental harm than separate project decisions at a later time. A 'program' 'umbrella,' or 'overview' impact statement consequently offers an occasion for consideration of basic policies, programmatic alternatives, geographic variations, cumulative impacts, and overall effects of large-scale programs or chains of proposed projects that cannot realistically take place in a statement on an individual action. Yet only about 50 such statements, largely on environmentally protective legislation, have been prepared.

"Many 'major federal actions' are likely to occur before a particular federal initiative is completed. A large archive of successive environmental analyses may accumulate if impact statements are prepared at each 'distinct and comprehensive' stage of an initiative, especially if impact statement preparation at the earliest possible opportunity becomes the rule. But rather than causing duplication and needless paperwork, these successive layers of statements can actually rationalize and simplify the § 102 process.

"Under this approach, the first statement prepared would cover pending legislation or broad, new federal policies; statements to follow would be prepared as each distinct initiative in implementing the legislation or policy was formulated. The later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the broader statements for their treatment of far-ranging alternatives and basic federal policy.

"Numerous advantages could be obtained through this approach. It would establish a record

²²See *E.D.F. v. Coastside County Water District*, *supra*, 27 C.A. 3d 695, 704, 104 Cal. Rptr. 197, 202 (Cal. Ct. of App. 1972).

of least-cost, gradually circumscribed decision making without subjecting the agency to reconsideration of basic principles each time a specific action was contemplated. This view is shared by the CEQ, which has suggested that the agency should issue broad program statements, in addition to subsequent statements on major individual actions to cover localized environmental impacts.

"As this approach gained currency, it would primarily affect the requirements for statement adequacy. No rigid set of rules for statement preparation could be written; the adequacy of the statement would depend upon the 'action' analyzed. The courts would most likely welcome such a development and adjust standards of statement adequacy accordingly, as indicated in the *Scientists Institute* case. Many of the current problems of the agencies stem from court-imposed requirements that statements on specific programmatic initiatives must reach back in time to cover the larger policy questions that supposedly were resolved months or even years earlier. There is a punitive overtone to some of these decisions. Agencies that passed up an opportunity to comply during the earliest possible phases of decision making may have been required to prepare their statements as if the choices of an earlier point in time still existed.

"Judicial reaction to overlapping statement preparation would also be tempered by the wider trend that has fundamentally altered the expectations of reviewing courts. Impact statement preparation in rational 'tiers' closely tracks the expanding requirements for a better statement of the reasons behind administrative action, for a

preliminary survey of alternatives, and for designation of the administrative record back to the time of inception of the proposal." Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law*, *supra*, note 16, at 418-419.

We suggest that the tiered approach suggested by Anderson provides a rational means of applying NEPA to actions ranging from the most general to the increasingly specific.

IV.

APPROXIMATELY HALF THE STATES HAVE LAWS OR ADMINISTRATIVE REGULATIONS PATTERNED ON NEPA. THIS COURT'S CONSTRUCTION OF THE FEDERAL LAWS WILL AFFECT THE CONSTRUCTION OF THE STATE LAWS PATTERNED UPON IT.

The decision of this Court on what is on its face an issue of Federal law will have severe ramifications for State law. Approximately half the States have followed the successful Federal example and have adopted laws or administrative regulations patterned in whole or in part on the National Environmental Policy Act. Both Federal and State Courts are apt to defer to Federal Court interpretations of NEPA in interpreting the State acts.

Twenty-six jurisdictions have now acted. Fourteen states and Puerto Rico have legislatively adopted little NEPAs of general application. California (Pub. Res. Code §21000 *et seq.*); Connecticut (Pub. Act. No. 73-

562, approved June 22, 1973); Hawaii (Haw. Rev. Stat. Ch. 334 (1974)); Indiana (§35-5301 *et seq.*); Maryland (Ch. 702, Md. Laws of 1973); Massachusetts (C. 30, §61 *et seq.*); Minnesota (Chap. 412, Laws of 1973); Montana (§69-6501 *et seq.*); New York (Art. 8, Environmental Conservation Law (1975)); North Carolina (Sess. Laws-1971, Chap. 1203); Puerto Rico (T. 12§1121 *et seq.*); South Dakota (S.D. Comp. Laws 1967 Ch. 11-1A (Supp. 1974)); Virginia (Chap. 384, approved March 15, 1973); Washington (§43.21C010 *et seq.*); and Wisconsin (Chap. 273, Laws of 1971). Five states have legislatively authorized little NEPAs of limited application. Delaware (7 §7001 *et seq.*); Georgia (Ga. Code Ann. Ch. 95-A-1, §241(e)(1)); Mississippi (§49-27-11(i), Coastal Wetlands Protection Law); Nevada (§704.820 *et seq.*). Also see Nevada Air Quality Regulations, Article 13); North Dakota (§54-01-05, 4 N.D. Century Code). Six states have administratively promulgated NEPA equivalents. Arizona (Game and Fish Commission policy of July 2, 1971; Policy Memo, Requirements for Environmental Impact Statements, of June 9, 1971); Michigan (Executive Directive 1971-10, issued by Governor); Nebraska (Neb. Dept. of Roads, Department of Roads Action Plan (1973)); New Jersey (N.J. Exec. Order No. 53 (Oct. 15, 1973) and Administrative Order No. 23 (August 1, 1973)); Texas (Policy for the Environment Adopted January 1, 1973); and Utah (Executive Order, August 27, 1974). See: Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 Env. Law Rptr. 50090 (1973); Council

on Environmental Quality, *Environmental Quality* (Fifth Annual Report, 1974) 401-409, 421-426.

These States look to Federal Judicial interpretations of NEPA to construe their own acts. *Friends of Mammoth v. Mono County*, 8 Cal. 3d 247, 260-261, 104 Cal. Rptr. 761, 769-770, 502 P.2d 1049, 1057-1058 (Cal. S.C. 1972); *Eastlake Community Council v. Roanoke Assoc., Inc.*, 513 P.2d 36, 44-45 (Wash. S.C. 1973); *Wisconsin's Environmental Decade, Inc., v. Public Service Commission of Wisconsin*, 230 N.W. 2d 243, 248 (Wisc. S.C. 1975); *People of the State of California v. County of Kern*, 39 C.A.3d 830, 841, 115 Cal. Rptr. 67, 75 (Cal. Ct. of App. 1974); see *Secretary of Env. Aff. v. Massachusetts Port. Auth.*, 323 N.E.2d 329, 339 (Mass. S.J. Ct. 1975); *Minnesota Public Interest Research Group v. Minnesota Environmental Quality Council*, 237 N.W.2d 375, 380-381 (Minn. S.C. 1975); *City of Davis v. Coleman, supra*, 521 F.2d 661, 672 (9th Cir. 1975); also see Yost, *NEPA's Progeny: State Environmental Policy Acts, supra*, at 50095 (1973).

CONCLUSION

We respectfully request that this Court in its disposition of the issue of the program environmental impact statement under NEPA, bear in mind the enormous importance of both the law and the program statement as a means by which States may become informed about and participate effectively in making the decisions which the Federal Government makes

which may significantly affect the environment of the several States.

Respectfully submitted,

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Attorney General

Dated, April 8, 1976.

(Appendix Follows)

APPENDIX

Appendix

MEMORANDUM TO THE HEADS OF AGENCIES

As you may know, the Supreme Court, recently issued its first major decision interpreting the National Environmental Policy Act (NEPA), *Aberdeen and Rockfish Railroad Co., et al. v. Students Challenging Regulatory Agency Procedures (SCRAP) et al.*, 422 U.S. 289 (June 25, 1975). Many agencies have questioned the Council on the meaning of the opinion and its probable impact on their procedures. In order to provide uniform and comprehensive guidance, the Council has prepared the enclosed explanatory memorandum on the case.

The Supreme Court addressed two issues in SCRAP: (1) whether the ICC violated NEPA by not holding a hearing on a second draft impact statement, prepared in connection with a general increase in railroad freight rates; and (2) whether the ICC's final EIS was deficient in not analyzing the environmental effects of the entire rate structure and in not extensively analyzing the impacts of a rate increase on recyclable scrap materials. The Court held that (1) oral hearings are not part of the ICC's "existing agency review process" and therefore no hearing was required on the second draft EIS, and (2) the narrow scope of the final EIS was appropriate in light of a broader, concurrent ICC investigation of the railroads' rate structure, and the opportunity for parties to challenge specific rate increases (e.g., on recyclables) in special proceedings.

SCRAP presented unique facts and a narrow decision. The ICC's three types of proceedings—a broad investigation of the entire rate structure, a concurrent review of the incremental rate increase, and the opportunity for parties to challenge specific increases—are not characteristic of most agencies. The Court relied on the breadth of the rate structure proceeding, and on the opportunity for detailed review of specific increases to conclude that the incremental increase was a limited federal action. Accordingly, the Court upheld a limited EIS.

Procedurally, the Court stated that final statements are due when a federal “proposal” exists. But the Court did not define what a “proposal” is or provide other guidance for identifying federal proposals.

In view of the ambiguity of the definition of “proposal” and the narrow facts of the case, the Council recommends no general change in agency NEPA procedures. Some agencies most likely need to alter their rulemaking procedures, however, to provide that final statements are prepared in time for the publication of proposed rules. Any agency which believes that rulemaking or any other changes may be necessary should consult the Council for a review of its particular situation.

I hope the Council's memorandum is helpful to you and your agency. I encourage your staff to contact the Council's staff directly on any particular questions concerning SCRAP and its effect in your agency's procedures.

RUSSELL W. PETERSON,
Chairman.

MEMORANDUM CONCERNING ABERDEEN & ROCKFISH RAILROAD CO. VERSUS SCRAP

The United States Supreme Court's second opinion in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (June 24, 1975) is the first major decision by a full Court construing the National Environmental Policy Act (NEPA). Because some agencies have informally raised questions concerning the possible impact of SCRAP on their NEPA procedures, the Council on Environmental Quality, pursuant to its responsibilities under the National Environmental Policy Act and under Executive Order 11514, provides the following guidance and advice.

BACKGROUND

As the Supreme Court noted in its opinion, knowledge of the unique factual setting of SCRAP is necessary to understand the legal issues. The Court described the Interstate Commerce Commission's (ICC) administrative proceedings in the syllabus to its opinion:

In December 1971, the Nation's railroads, citing sharply increasing costs and decreasing or negative profits, collectively proposed to file tariffs increasing their freight rates by a temporary surcharge across the board. The Interstate Commerce Commission (ICC) in the ensuing general revenue proceeding, finding that the railroads had a critical and immediate need for revenue, declined to exercise its power to suspend proposed rate increases, and the surcharge became

effective in February 1972. The railroads shortly filed for larger, selective rate increases, but in April 1972 the ICC suspended the effectiveness of these increases pending its investigation of their lawfulness, the ICC the previous month having served a brief draft environmental impact statement on all parties to the investigation, discussing the environmental consequences of rate increases with respect of recyclables in general terms and concluding that there was no basis yet to believe that the environment would be substantially affected thereby . . . [I]n October 1972, after an oral hearing, the ICC issued a final report declining to declare the selective rate increases unlawful, terminating the previously entered suspension order, canceling the surcharge that had been subsumed in the selective increases, and ordering a ceiling on rate increases with respect to some but not all recyclables. The report stated that having given extensive consideration to environmental factors,¹ the ICC would not file a separate, formal impact statement under the NEPA, and pointed out that the ICC had begun a separate investigation into the entire rate structure focusing on whether it interfered with the Government's environmental program. However, in November 1972, the ICC reopened its investigation into the lawfulness of selective

¹(CEQ note) In an unusual procedural sequence, the "final report" expressed the ICC finding that the actions would have no significant environmental effect, even though a "draft" had been filed. This finding eliminated all legal requirements for any draft or final impact statement up to that point in time if the finding was supportable. The report was a type known in practice as a "negative declaration" (statement that no significant impact will be created) and therefore was not a "final impact statement" as that term is generally used.

rate increases to reconsider the environmental effects of the new rates on recyclables, such rates being suspended for an additional period with the railroad's consent. In March 1973 the ICC served an expanded draft impact statement, concluding that its order of October 1972 had been correct, and finally terminating its investigation without declaring any of the proposed rates unlawful except as previously provided in the October 1972 order.

The NEPA issues before the Supreme Court concerned the lower court's conclusion that:

. . . the ICC had failed to comply with NEPA in two respects. *First, no oral hearing had been held after circulation of the second draft statement of March 13, 1973, and before the preparation of the final impact statement. . . .* [The District Court] ruled that since the ICC held an oral hearing before adopting its October 4, 1972 report, such a hearing was therefore presumptively an "existing agency review process" and one should have been held before adopting the final environmental impact statement on May 1, 1973. Moreover, the ICC had simply reconsidered its October 4, 1972 decision in light of the impact statement, instead of starting all over again from the beginning. In order to start over again, it had to consider its impact statement at an oral hearing. *Second, the court concluded that the report did not give "good faith" consideration to environmental factors It held the statement deficient in two respects. First, it held that the statement did not sufficiently analyze the underlying structure. . . . Second, the ICC should have more extensively explored the quan-*

titative response of recycling businesses to freight rates. . . . (Slip opinion, pp. 11-12). (Emphasis added.)

Thus, the Supreme Court examined narrow issues both of scope of the ICC statements (EIS) and the procedure which the ICC followed.

SCOPE OF THE EIS

This issue turned on a determination of the nature and scope of the "federal action" involved. The Supreme Court said that under relevant case law the primary issue before the ICC in general revenue cases is the financial need of the railroads. Challenges to specific rates on individual commodities (e.g., recyclables) should be left "primarily to more appropriate future proceedings." (*id.*, 29) The Court noted that challenges to *specific* increases would raise "the most serious environmental issues"; in contrast, the general revenue proceeding "raise[d] few environmental issues." (*id.*, 29). Moreover, the Court found it significant that "the ICC had begun an investigation of the underlying rate structure [in a different proceeding] . . . and had started devoting attention to environmental issues in that proceeding before the decision of the court below." (*id.*, 31) The Court saw no purpose in ordering the ICC "to thoroughly explore the question [of the underlying structure] in the confined and inappropriate context of a railroad proposal for a general rate increase when it was already doing so in a more appropriate proceeding." (*id.*, 31)

For these reasons, the Court held that the "decision of the lower court . . . to deem the "federal action" involved . . . to include an implicit approval of the underlying rate structure was inaccurate." (*id.*, 31) Resolution of the case therefore became "easy"—the ICC's environmental impact statement was adequate in light of the narrowly limited nature and scope of its proposed action, and in light of the contemporaneous "more appropriate proceeding."

Substantively, this part of the decision stands for the common sense proposition that the nature and scope of required analysis is related to the nature and scope of the relevant action and its potential impact. In *SCRAP*, the statement was adequate only because the action and its impacts were extremely limited and because larger impacts were being analyzed in another, broader proceeding. The Court did not suggest that a limited EIS would suffice for a federal action which raised issues of greater environmental scope.

Thus, agencies should continue to tailor the scope of impact statements to the scope of proposed actions and their environmental impacts. Agencies which sponsor incremental actions with cumulative significant impacts (e.g., individual coal leases or highway segments) should continue the practice of preparing program statements covering the cumulative environmental effects of the broader programs, as prescribed in Sec. 1500.5 of CEQ's Guidelines. Similarly, they should continue to look at longer range impacts and decision options which might be preempted by their

proposed actions. CEQ will continue to assist agencies in defining the proper scope of project and program assessments and statements, consistent with the SCRAP opinion.

PROCEDURAL ISSUES

Concerning the procedural issues, the Supreme Court held that the lower court erred in two respects:

. . . in deciding that the oral hearing which the ICC chose to hold prior to its October 4, 1972 order was an "existing agency review process" during which a final draft environmental statement (i.e., the one circulated in March, 1973) should have been available and . . . in deciding that the ICC should have "started over again" after it decided to prepare a formal impact statement. (*Id.*, 25-26)

In reaching this conclusion, the Court reviewed two aspects of the impact statement process:

The draft and comment phase.

The timing of the final statement.

The Court's discussion of these points follows (footnotes excluded):

We agree with appellants that the District Court erred in deciding that the oral hearing which the ICC chose to hold prior to its October 4, 1972 order was an "existing agency review process" during which a final draft environmental impact statement (i.e., the one circulated in March, 1973) should have been available and that it also erred in deciding that the ICC should have "started over again" after it decided to prepare a formal impact statement.

NEPA provides that "such statement . . . shall accompany *the proposal* through the existing agency review processes". This sentence does not, contrary to the District Court opinion, affect the time when the "statement" must be prepared. It simply says what must be done with the "statement" once it is prepared—it must accompany the "proposal." The "statement" referred to is the one required to be included "in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment" and is apparently the final impact statement, for no other kind of statement is mentioned in the statute. Under *this* sentence of the statute the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972 report, the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972—sometime after the oral hearing.

The statute also requires that agencies consult with other environmentally expert agencies "prior to making any detailed statement" and CEQ guidelines provide that:

To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action . . . Agencies should make *any* draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.

Such consultation occurred here from the outset; environmental issues pervaded the hearings held—both oral and written; and all draft impact statements in existence were circulated before the hearings. *Procedurally* NEPA was thus thoroughly complied with through October 4, 1972. (*id.*, 25-27) (emphases in original)

Most of the questions which have been informally raised by agencies have concerned the possible implications of this portion of the opinion for (a) the need for a draft EIS and (b) the timing of preparation of the EIS.

DRAFT STATEMENTS

The Supreme Court commented on NEPA's requirement that a statement accompany an agency proposal through the review process, and reinterpreted the legal basis for draft statements. In practice, however, the role of draft statements appears to be unchanged by the Court's decision.

The District Court had relied on the sentence, in the Act which requires that statements be used in agency review processes, to decide that the ICC violated NEPA by omitting a hearing on the ICC's second draft statement, when a hearing had been held earlier.

The Supreme Court said this reliance was misplaced. According to the Court, the Act's mandate that an EIS accompany a proposal through agency review does not determine *when* a draft EIS is to be prepared, but instead dictates *how* a statement is to be used after it is prepared:

This sentence does not, contrary to the District Court opinion, affect the time when "the statement" must be prepared. It simply says what must be done with the "statement" once it is prepared. (*id.*, 26)

The process of preparing and circulating draft statements relates not to the agency review requirement, but to the consulting requirement in Sec. 102 (2)(C):

The statute also requires that agencies consult with other environmentally expert agencies "prior to making any detailed statement": . . . such consultation occurred here from the outset; environmental issues pervaded the hearings held—both oral and written; and all draft impact statements in existence were circulated before the hearings. (*id.*, 27)

The Court found that the ICC had prepared and circulated a draft statement, received substantial comment, and thereby satisfied the consulting requirement. In sum, the Court (1) interpreted the draft and comment process as a practice which satisfies the consulting requirement rather than the agency review requirement, and (2) found that the ICC had prepared and circulated its own draft. In practice, the

draft and comment process remain unchanged from the description in the Council's Guidelines of August 1, 1973.

The source of agencies' questions to the Council about draft statements is a sentence in the opinion related to the timing of statements. The Court said:

The "statement" [which must accompany a proposal through agency review] . . . is apparently the final impact statement, for no other kind of statement is mentioned in the statute. (*id.*, 26)

One might question whether the Court meant that draft statements are unnecessary under NEPA. Such an inference strains the opinion, however, for two reasons. First, the Court found the ICC *had* issued a draft EIS (on March 6, 1972, following the railroads' filing of their proposed rate increases on February 28, 1972). Thus, the question of the need for a draft EIS was not before the Court. Second, the quoted sentence appeared in the Court's discussion of timing, not its discussion of draft statements. Thus, any inference that draft statements are unnecessary would take the Court's statement out of context. A more reasonable conclusion is that the Court assumed a draft statement had been prepared, and that the need for a draft statement was therefore not an issue before the Court. The draft and comment process remains an integral part of building genuine environmental analysis into federal decision making, consistent with Congressional intent and ongoing practice.

TIMING OF DRAFT AND FINAL STATEMENTS

The Court commented on the timing of statements, which it related to the timing and definition of "proposals." The definition of proposal is critically important in agencies' EIS scheduling, but the Court offered little guidance on its meaning. Because of the ambiguity in the opinion, the fact that the Court's statements in SCRAP are based on unique facts, and the possible interpretation of this portion of the opinion is dictum, the Council recommends no general changes in EIS timing or procedures at this time. If individual agencies believe that specific changes may be necessary for some of their actions, they should contact the Council's staff and review the need for any change.

The Court indicated that the timing of a final EIS is determined by the provision requiring that it be included in recommendations or reports "on proposals":

Under *this* sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action. (*id.*, 26) (emphasis in original)

The Court discussed this conclusion in the context of two types of agency proceedings.

First, it said, "[w]here an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear

to require an impact statement to be included in the proposal and to be considered at the hearing." (*id.*, 26) This sentence may require a change in some agency procedures for actions initiated by formal publication of a proposal (e.g., publication of proposed regulations). The fact of publication does not necessarily equate with the existence of a "proposal," however, and the Court's opinion does not define what a "proposal" is. For example, the Bureau of Land Management publishes several formal notices in the course of selling leases for offshore drilling, including a call for nomination of tracts, preliminary designation of tracts and invitation for bids, and award of leases. The Supreme Court's opinion does not appear to overrule BLM's procedures, which designate the bid notice as the "proposal," because the decision does not provide standards for determining which of those published notices should be considered the "proposal" under NEPA. Moreover, the Court's sentence quoted above is not material to the holding in *SCRAP*, since the "proposal" in *SCRAP* was not initiated by the ICC. Accordingly, the Council believes that the most reliable guidance comes from the Council's Guidelines and from existing lower federal court decisions which better define the time when federal actions reach a stage of development sufficient for NEPA to apply. See, e.g., *e CEQ Guidelines*, Sec. 1500.6; *Scientists' Institute for Public Informant v. AEC*, 481 F.2d 1079 (1973); and, more recently and distinguishing *SCRAP*, *No East-West Highway Committee, Inc. v. Whitaker*, No. 73-199 (D.N.H., Oct. 22, 1975).

The Supreme Court also discussed timing of final statements in fact situations such as those in *SCRAP*, where the agency not only acted exclusively in an adjudicative capacity, but also had no role in initiating federal action. The Court indicated that, in such cases a final statement need not be issued until the agency makes a proposal, recommendation, or report *of its own* (as opposed to consideration of a private party's proposal):

Here . . . until the October 4, 1972 report, the ICC had made no proposal recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972 . . . (*id.*, 26) (emphasis original)

It was unnecessary for the Court to develop this conclusion because the ICC had determined as of October 4 that the rate increases would *not* significantly affect the environment. (See also, note 1, p. 2 *supra*):

Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have not included in our report an extensive formal impact statement. ICC, *Ex Parte No. 281*, a 314 (Sept. 27, 1972). (See also, slip opinion, p. 7.)

The fact is that the Court did address this timing question, and said that final statements are due (at the latest) under the statute when agencies make their recommendations or reports on federal pro-

posals. Several other elements in the case illuminate this statement on timing.

First, according to the Court, the ICC's method of proceeding includes no major decision points between an applicant's filing and the Commission's decision. The Court apparently concluded that in ICC's general revenue proceedings, hearings are minor, discretionary events in the investigative process. This practice contrasts with other adjudicative agencies—such as the NRC and the FPC, for example—where proceedings include formal staff positions and hearing panels and/or formal reports by hearing panels or administrative law judges prior to a commission decision. These staff positions and hearing reports are probably “recommendation[s] or report[s] on . . . proposal[s] for federal action” under the SCRAP opinion.

Second, the Court found that “consultation occurred . . . from the outset; environmental issues pervaded the hearings held—both oral and written” (*id.*, 27) before the ICC's October 4th decision. Even though the ICC did not prepare a separate, formal EIS, the Court was apparently persuaded that the ICC had consulted heavily with outside parties in environmental issues, and had in fact integrated its environmental analysis into its decision making (*id.*, 26-28). Although the Court did not require a final EIS to be *issued* until the agency made its recommendation or report, the Court seemed convinced that an environmental analysis was *prepared* and *used* in the agency decision process.

Finally, this portion of the Court's decision does not affect the timing of any draft EIS that might be required. In this connection, it should be recalled that in support of its conclusion that the ICC had satisfied the consultation requirement, the Court noted that “all draft impact statements in existence were circulated *before* the hearings.” (*id.*, 27) (emphasis added)

CONCLUSIONS

SCRAP is a complex decision. It concerned a federal action uniquely limited in scope, and its applicability to other situations is not clear. It raises ambiguities concerning precisely which EIS procedures might be required by the statute alone, but does not negate responsibilities flowing from other authorities such as the Guidelines, nor does it appear to compel changes in effective ongoing practices.

In issuing guidance to agencies, the role of the Council is not and has never been merely to outline the bare minimum necessary for compliance. Such considerations are, of course, relevant to the preparation of the Guidelines; but the Council's determinations are based additionally on policy factors relating to the need to effectively implement NEPA, and Executive Order 11514.

Nothing in the Council's Guidelines is inconsistent with the holdings of SCRAP. Specifically, in terms of the procedural issues discussed above:

(1) Circulation of draft statements is the most effective way to achieve the required consultation. It provides commenting federal agencies, States and the

public with an identifiable opportunity to focus on a single, written, analysis of an agency proposal, and provides the author agency with a manageable, efficient device for obtaining detailed technical expertise, and value judgments of the commenting parties. The draft and comment process also provides an opportunity for careful internal analysis of a proposal, and yields an analysis document that can be critically important in agency decision making.

(2) The Court's comments on timing of final statements will most likely require changes in agency rule-making practices, but not otherwise. The need to issue a final EIS upon publication of proposed rules is not mandated by the Court's holding, but publication of proposed rules is so clearly a federal "proposal" that the Council believes a case which presented this question would produce a decision requiring an EIS at the time of publication. The narrowness of the Court's holding, however, and the absence of guidance from the Court on what constitutes a proposal lead the Council to recommend no other general changes in agency NEPA procedures based on SCRAP.

Any agency which believes that changes in procedures may be necessary should consult the Council for a review of its particular situation.

1975 National Environmental Policy Act Oversight Hearings, House Merchant Marine and Fisheries Committee, 94-14, p. 246 *et seq.* 1975).

Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

NO. 75-581

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF

For Environmental Defense Fund, Inc.; Natural Resources Defense
Council, Inc.; National Audubon Society, Inc.; Friends of the
Earth; Environmental Policy Center; Environmental Action;
Defenders of Wildlife; Colorado Open Space Council, Inc.; National
Parks & Conservation Association

AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1975

NO. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
ET AL., *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

NO. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF

For Environmental Defense Fund, Inc.; Natural Resources Defense
Council, Inc.; National Audubon Society, Inc.; Friends of the
Earth; Environmental Policy Center; Environmental Action;
Defenders of Wildlife; Colorado Open Space Council, Inc.; National
Parks & Conservation Association

AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

This brief is submitted by the above *Amici Curiae* in
support of the position of Respondents Sierra Club, *et al.* that
the judgment of the Court of Appeals in *Sierra Club v.*
Morton, 514 F.2d 856 (D.C. Cir. 1975) should be affirmed.

All parties to the case have given their written consent to the filing of this brief, pursuant to Rule 42(2) of this Court, and their consents have been filed with the Clerk.

I. DESCRIPTION AND INTEREST OF AMICI CURIAE

The Environmental Defense Fund is a national organization of scientists, lawyers and economists working to protect the public interest in the areas of environmental quality, energy, and public health. Established in 1967 as a non-profit, public membership corporation, EDF has approximately 44,000 members nationally and offices in East Setauket, New York; New York City, New York; Denver, Colorado; Logan, Utah; Berkeley, California; and Washington, D.C. The National Environmental Policy Act has been a focus of EDF litigation and other actions involving federal programs and projects in energy development, water resource development, transportation, toxic chemicals and wildlife. EDF believes steady implementation of the Act's requirements has brought about noticeable, positive change in a number of the federal agencies, beneficial modifications in some projects and programs, and a broader consideration of alternatives and options, benefitting both the environment and taxpaying public. EDF has long been concerned with energy-related developments in the Northern Great Plains, and opened its Denver office in 1973 primarily to focus on those developments. The lawyers and scientists in EDF have conducted a wide variety of action programs with respect to energy and related water development problems in the region. Assuring compliance with NEPA is an essential element of these EDF programs which seek a rational balance between resource exploitation and environmental protection.

Natural Resources Defense Council, Inc. is a non-profit national organization with its principal place of business in New York City and offices in Washington, D.C., and Palo Alto, California. NRDC has some 23,000 members including

scientists, educators, lawyers, environmentalists and other concerned citizens who use and enjoy our natural resources and who seek to protect these resources and the human environment from unnecessary and unwise encroachment and destruction. Working through the courts and administrative agencies, NRDC from its inception in 1970 has been active in efforts to insure that federal agencies whose activities significantly affect the environment conform their decisionmaking to the standards established by Congress in the National Environmental Policy Act. NRDC believes the National Environmental Policy Act is perhaps the nation's single most important environmental law and believes further that it is responsible for a major improvement in both the procedure and substance of the decisionmaking of many of the agencies. NRDC is actively involved with energy related development in the Northern Great Plains region through its work with federal agencies concerning the formulation of sound policies on coal leasing, mining reclamation, protection of air and water quality and related issues. NRDC believes that proper implementation of NEPA by those federal agencies with responsibility for making decisions on energy-related development in the Northern Great Plains region would have invaluable, lasting benefits for the region and the nation as a whole.

The National Audubon Society, Inc. is a not-for-profit environmental organization, founded in 1905 and engaged in educative, scientific, investigative, and charitable pursuits to further the conservation of wildlife, habitat and other natural resources. Headquartered in New York City, National Audubon has 345,000 members in 365 chapters in 45 states and abroad. The National Audubon Society has actively supported the National Environmental Policy Act from its enactment, recognizing the enormous benefit the Act has brought and will continue to bring to federal project planning if properly enforced. The organization has pursued a course of oversight of the Act's implementation, publishing information on it, testifying before Congress, and in select circumstances litigating cases of NEPA violations in water resource projects, highways and wildlife. Application of NEPA to the Northern Great Plains energy-related developments is of particular

concern to Audubon and is one of the primary focuses for action of Audubon's Rocky Mountain regional office in Boulder, Colorado, and its 14 chapters in the four-state region. Audubon's concern with energy development in the Northern Great Plains is a part of its concern for a comprehensive national energy policy and sound management of the public lands.

Friends of the Earth is an international organization committed to the preservation, restoration, and rational use of the ecosphere. One of the major action programs of Friends of the Earth is focused on coal production and related environmental impacts in the Northern Great Plains. To this end it has established regional representatives in Billings, Montana; Missoula, Montana; Meeteetse, Wyoming; Alpena, South Dakota; Minot, North Dakota; and Denver, Colorado, to work directly in the region on energy-environmental problems. Friends of the Earth is also vitally concerned with the National Environmental Policy Act of 1969 and has been involved in litigation defending the Act in cases involving energy, water resource projects, highways and wildlife preservation. Incorporated in 1969 in New York, the organization has its major offices in San Francisco, New York City, and Washington, D.C. It has 23,000 members in the United States and has sister organizations in 14 foreign nations.

The Environmental Policy Center is a non-profit organization founded in 1972 to develop and make available the information needed for informed public participation in governmental decisions affecting the environment. The Center serves as the Washington base for legislative activities for many environmental, agricultural, community and citizen groups. The Center staff have invested considerable resources in investigating, analyzing and reporting on Northern Great Plains energy developments and their relationship to the Center's broad concerns with federal and state policies for energy development, water resource management, and land use planning. The National Environmental Policy Act of 1969 is a key tool in the Center's work, providing both the information and the incentive to bring about sound public resource planning and decisionmaking.

Environmental Action is a non-profit, political action organization designed to coordinate and support citizen efforts on behalf of the natural environment. One of its major programs is the publication of the magazine *Environmental Action* which regularly reaches Environmental Action's nearly 12,000 supporters throughout the country. Through the magazine and other educational programs, Environmental Action keeps citizens informed on topics of major environmental concern, particularly on Northern Great Plains energy developments and environmental impacts. The National Environmental Policy Act of 1969 has been and continues to be an overriding concern of the organization and Environmental Action has devoted much of its resources, its publication and education programs, and its legislative lobbying activity to insure the effectiveness of NEPA.

Defenders of Wildlife is a national, non-profit organization, headquartered in Washington, D.C. Founded in 1925, the organization promotes, through education and research, the protection of all mammals, birds, fish and other wildlife and the protection of environmentally proper habitat for these wildlife resources. The National Environmental Policy Act has proved a crucial force for protection of these wildlife resources, calling as it does for a generic change in federal planning and decisions. No other statute has the capability of reforming wildlife practices at this most basic planning level. Application of the National Environmental Policy Act's requirements to the Northern Great Plains Region is of vital concern to Defenders of Wildlife, since that region is one of the richest, most diverse wildlife resources remaining largely unimpacted by man's activities.

The Colorado Open Space Council, Inc. is a coalition of over 40 Colorado organizations, representing over 30,000 members in the fields of environment, recreation, and public health. Founded in 1965, COSC works through public education and information, legislative lobbying and direct contact with federal resource agencies to reform federal planning and decisionmaking with respect to the environment. Federal land management and NEPA decisions in the neighboring Northern

Great Plains have direct bearing upon future federal management plans for Colorado and are of intense concern to COSC. COSC strongly supports the National Environmental Policy Act, having lobbied for its passage in 1969 and further supported the bill in oversight hearings through the past six years.

The National Parks & Conservation Association is a non-profit conservation organization, headquartered in Washington, D.C., with approximately 45,000 members in the U.S. and abroad. NPCA was established in 1919 to protect the integrity of the National Parks and other public natural areas, to develop an informed appreciation for their significance, and to promote their enlargement. NPCA works closely with the federal agencies, scientific organizations and citizen groups concerned with federal land and resource management. The National Environmental Policy Act has been a positive force in NPCA's programs for improvement in federal management. The Northern Great Plains region is a key concern of the organization because of the potential impacts of energy development on the region's National Grasslands and other natural reserves and resources.

These *Amici* are responsible examples of the "concerned public and private organizations" that Congress expressly envisioned would play a large role in enforcing the National Environmental Policy Act. Section 101(a), 42 U.S.C. § 4331(a); Sections 205(1), (2), 42 U.S.C. §§ 4345(1), (2).

ARGUMENT

Amici Curiae fully support the arguments of Respondents that the National Environmental Policy Act of 1969 (NEPA)¹ requires the preparation of a program-level environmental impact statement (EIS) covering energy-related developments in the Northern Great Plains region.

What most concerns *Amici* is that the Government's arguments in opposition to such a program-level EIS, if

¹42 U.S.C. §§ 4321-47 (1970).

adopted by this Court, could nullify the primary requirement of NEPA — namely that federal agency policies and actions affecting the environment be described, analyzed and weighed against their alternatives *before* the Government becomes so committed to a course of action that reasonable alternative courses are foreclosed.

That would be the effect of holding that as a matter of law federal planning for management of the energy resources of the Northern Great Plains cannot have reached the stage of a "proposal for . . . major Federal action," within the meaning of Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requiring preparation of an EIS.

The determination of what constitutes a "proposal," sufficiently defined to require an EIS, is fundamental to this case and to the continued success of the Act. It is essential the term "proposal" be construed consistent with the sweeping goals for reform that led Congress to enact NEPA and the central role of the EIS in assuring those goals are met.

Parts I and II of this brief address those Congressional goals and the important changes in agency planning and decisionmaking NEPA has effected to date. Part III addresses the issues of EIS scope and timing presented in this case in light of the Congressional goals and agency practice.

I. CONGRESS INTENDED NEPA TO CAUSE MAJOR, NEEDED REFORM OF THE FEDERAL PLANNING AND DECISION PROCESS.

The National Environmental Policy Act of 1969 unites a carefully worded statement of national environmental policy with a statutory plan of action to put the policy into practice throughout the federal government decisionmaking process.

The urgent need for change in national priorities was keenly felt by Congress:

The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing

man's impact on his environment under informed and responsible control. The economic costs of maintaining a life-sustaining environment are unavoidable. . . . In our management of the environment we have exceeded its adaptive and recuperative powers, and in one form or another we must now pay directly the costs of maintaining air, water, soil, and living space in quantities and qualities sufficient to our needs. Economic good sense requires the declaration of a policy and the establishment of a comprehensive environmental quality program now. Today we have the option of channeling some of our wealth into the protection of our future. If we fail to do this in an adequate and timely manner, we may find ourselves confronted, even in this generation, with an environmental catastrophe that could render our wealth meaningless and which no amount of money could ever cure.²

The legislative history of NEPA confirms that it was enacted as a direct response to inadequacies in environmental decisionmaking on the part of the federal bureaucracy. Congress's solution and overriding goal was to cause fundamental change in the actual policy-setting, planning, and decision-making processes of the agencies.³ In introducing S. 1075,

²S. REP. NO. 91-296, 91st Cong., 1st Sess. 17 (1969). Urgency was a dominant theme in the Congressional deliberations:

Today it is clear we cannot continue on this course. Our national resources — our air, water, and land — are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by short-sighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are [sic] clear.

Id. at 5 (footnote omitted).

³See, S. REP. NO. 91-296 at 4-17 (1969); L. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENV. L. REP. 50030 (1976) (hereafter Caldwell); COUNCIL ON ENVIRONMENTAL QUALITY, THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 221-25 (1972) (hereafter 1972 CEQ ANN. REP.). The Council on Environmental Quality (CEQ) was created by NEPA. Sections 202-09, 42 U.S.C. §§4342-49. Its chief function is to oversee federal agencies' compliance with NEPA — "to review and appraise the various programs and activities of the Federal government

Senator Jackson, one of the primary authors of NEPA, called the Senate's attention to the need for fundamental reform:

Our present governmental institutions are not designed to deal in a comprehensive manner with problems involving the quality of our surroundings and man's relationship to the environment. The responsibilities and functions of government institutions as presently organized are extremely fractionated. . . . This organization reflects our early national goals of resources exploitation, economic development, and conquest.

Our national goals have, however, changed a great deal in recent years. Today Government organization does not reflect this change in objectives and new demands which are being placed on the environment.⁴

The Senate Report scored uncoordinated, incremental policies and decisionmaking as the root problem to be cured:

As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in

³(Continued)

in light of the policy set forth in [Sections 101 and 102] of this Act." Section 204(3), 42 U.S.C. §4344(3). The President's Executive Order implementing NEPA accordingly directs CEQ to "evaluate existing and proposed policies of the Federal Government directed to the control of pollution and the enhancement of the environment," "determine the need for new policies and programs," "coordinate Federal programs related to environmental quality," "issue guidelines to Federal agencies for preparation of [EISs] . . . required by Section 102(2)(C)" and "issue such other instructions to agencies . . . as may be required" to implement the Act. Section 3(a), (c), (f), (h), (i), Executive Order No. 11514 (March 5, 1970), 3 C.F.R. 271 (1974).

Current CEQ NEPA Guidelines are codified at 40 C.F.R. §§1500.1-14 (1973). The Guidelines are entitled to great weight in judicial evaluation. *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1178 (6th Cir. 1972); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 86 (2d Cir. 1975).

⁴115 CONG. REC. 3699 (1969). See also, S. REP. NO. 91-296 at 4-5; 115 CONG. REC. at 40417.

the past. Policy is established by default and inaction. Environmental problems are dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.⁵

The Congressional reports and debates repeatedly cite "poor" federal "policies" and inadequate "planning" as major contributors to "environmental decay and degradation."⁶ Reform was not viewed as possible "unless the results of planning are radically revised at the policy level."⁷

The central issue in this case — federal agency planning and decisionmaking in the development of our natural resources — was singled out as one of the most critical areas needing NEPA reform. The Senate version, which became the base for the Act, was:

designed to minimize the conflict between resource development and the maximization of environmental values. Subsection 102(a) [present 102(2)(A)] requires all agencies to utilize the expertise and learning of all relevant disciplines in planning and decisionmaking on actions which may have an adverse impact on man's environment. Subsection 102(b) [present 102(2)(B)] requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking. . . .

The provisions . . . are designed to establish a policy and a set of planning procedures which will prevent instances of environmental abuse and degradation caused

⁵S. REP. NO. 91-296 at 5.

⁶*Id.* at 6-8, 12. See also, 115 CONG. REC. 26583 (House debates) and 29089 (Senate).

⁷S. REP. NO. 91-296 at 20.

by Federal actions before they get off the planning board.⁸

Congress recognized that stringent means would be required to bring about this fundamental reform in federal policies, plans and decisions. Complete structural reorganization of the executive branch⁹ and separate, specific amendment of each agency's organic statutes to require environmental planning and decisionmaking¹⁰ were considered and rejected. Instead, Congress chose primarily "non-structural" means to implement this across-the-board reform, combining (1) a broad statement of national environmental policy (Section 101), (2) environmental planning and study requirements (Sections 102(2)(A) - (I)), and (3) the critical "action-forcing" mechanism of the environmental impact statement (Section 102(2)(C)).¹¹

Section 101(a) establishes as national policy that federal agencies shall "use all practicable means and measures" to "create and maintain conditions under which man and nature can exist in productive harmony."

The policy is amplified in Section 101(b) by six specific environmental mandates which require the federal agencies to improve and coordinate their "plans, functions, programs, and resources" to fulfill the national environmental policy.

⁸115 CONG. REC. 29055 (1969) (remarks of Sen. Jackson). See also, H. REP. NO. 91-378 (Part 1), 91st Cong., 1st Sess. 3 (1969) ("strip mining"); 115 CONG. REC. 29089 ("piecemeal approach to problems of natural resources") (remarks of Senator Allott); S. REP. NO. 91-296 at 6 (coordination of natural resource agencies), at 9 ("resource-oriented projects").

⁹See, Testimony of Dr. Lynton Caldwell, *Hearing on S. 1075, S. 237, and S. 1952 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 115 (1969) (hereafter 1969 Senate Hearings); Comment, *The National Environmental Policy Act Applied to Policy-Level Decisionmaking*, 3 ECOLOGY L. Q. 799, 806 n. 29 (1973).

¹⁰1969 Senate Hearings at 117 (remarks of Senator Jackson); 3 ECOLOGY L. Q., *supra* note 9, at 806 n. 30.

¹¹S. REP. NO. 91-296 at 9; 115 CONG. REC. 40416 (1969) (remarks of Senator Jackson).

To implement further the Section 101 policy, Congress established in Section 102 a number of independent planning requirements — in addition to the EIS required in Section 102(2)(C). Section 102(2)(A) requires all federal agencies to “utilize a systematic, interdisciplinary approach” to insure use of the natural, social and environmental sciences “in planning and in decisionmaking.”

Section 102(2)(B) requires the federal agencies to insure that environmental values are given “appropriate consideration in decisionmaking.”

Section 102(2)(E) (formerly 102(2)(D)) requires agencies to “study, develop and describe” alternatives to their actions whenever there are unresolved conflicts over use of resources.

Section 102(2)(H) (formerly 102(2)(G)) requires that ecological information be initiated and used “in the planning and development of resource-oriented projects.”

Congress recognized that, absent some “action-forcing” mechanism, implementation of these crucial environmental goals and planning mandates could not be assured. Section 102(2)(C) — with its requirement of a “detailed statement” on every proposal for major federal action significantly affecting the environment, including analysis of its environmental impacts and alternatives — was specifically designed by Congress to insure that its environmental policies and planning reforms are carried out.¹²

A leading contributor to the development of the EIS concept, Dr. Lynton K. Caldwell, has stated:

The impact statement was required to force the agencies to take the substantive provisions of the Act seriously, and to consider the environmental policy directives of the Congress in the formulation of agency plans and procedures.¹³

¹²Authorities, *supra* note 11.

¹³Caldwell, *supra* note 3, at 50033 (emphasis added). Dr. Caldwell served as Consultant to the Senate Interior Committee in the drafting of NEPA and first proposed the EIS.

The EIS process — properly applied — serves Congress’s purpose in two essential ways. First, timely EIS preparation assures that environmental concerns are made a meaningful part of the agency decisionmaking process by requiring the agency to engage in a systematic analysis of a proposal before committing the Government to it. Second, the EIS fulfills NEPA’s role as a “full disclosure law,” giving Congress, other agencies, states and the public information on proposed agency actions, impacts and alternatives at a stage early enough to permit recourse to ordinary political processes to affect the decisions being made. See, *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Scientists’ Institute for Public Information v. AEC*, 481 F.2d 1079, 1091 nn. 48, 49 (D.C. Cir. 1973).

Interpretation of 102(2)(C)’s language is subject to the overriding requirement of effectuating the Congressional purpose and policy behind the language. *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1173 (6th Cir. 1972). Accord, *Richards v. U.S.*, 369 U.S. 1, 11 (1962); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). Read in light of Congress’s intense dissatisfaction with then existing agency planning and decisionmaking processes, Section 102(2)(C) clearly requires EIS preparation at a stage when agency policies, plans and decisions are still being formulated and major alternatives and options have not been foreclosed.

II. NEPA IS PROVING EFFECTIVE AS THE CONGRESSIONAL REMEDY FOR INADEQUATE FEDERAL PLANNING AND DECISIONMAKING.

Recognition of the importance of NEPA for federal agency planning and decisionmaking was immediate. The Presidential Executive Order No. 11514 (March 5, 1970) which implements the Act directs (Section 1):

Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals.

Six years of experience with NEPA has demonstrated its positive contributions to sound planning and decisionmaking, including: (1) better consideration of environmental values, (2) minimizing the negative impacts of federal projects, (3) screening out some projects because of unacceptable impacts, (4) a greater environmental awareness among federal agencies, (5) improved interagency and intergovernmental cooperation, and (6) a greater public involvement in federal programs and projects.¹⁴

The Courts were also quick to recognize that the Act was intended to make a major, positive reform in federal planning and decisionmaking:

The congressional mandate is clear. Federal officials are to appraise continuously all of their activities not only in terms of strict economic or technological considerations but also with reference to broad environmental concerns. They are to coordinate hitherto separate operations so that undesirable environmental effects may be perceived and minimized. Subject only to the limitation of practicability, they are to strive constantly to improve federal programs to preserve and enhance the environment. In other words, federal officials are required to assume the responsibility that the Congress recognized, in section 101(c) of the NEPA, as the obligation of all citizens: to incorporate the consideration of environmental factors into the decisionmaking process.

Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164, 1174 (6th Cir. 1972).

The concept of that Act was that responsible officials would think about environment before a significant

¹⁴See, Testimony of Council on Environmental Quality, *Hearings on Oversight of the National Environmental Policy Act Before The Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 204-06 (1975) (hereafter 1975 NEPA Oversight Hearings); Testimony of Dr. James L. Cooley, *id.* at 185-86; 1972 CEQ ANN. REP. at 255-57.

project was launched; that what would be assessed was a proposed action, not a fait accompli; that alternatives to such action would be seriously canvassed and assayed; and that any irreversible effects of the proposed action would be identified. The executive branch guidelines made even more clear that the purpose of the statute was to "build into the agency decision process" environmental considerations, "as early as possible," taking into account "the overall, cumulative impact of the action proposed (and of further actions contemplated)" and "environmental consequences not fully evaluated at the outset of the project or program."

Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972) (citation and footnote omitted). Accord, *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1326 (4th Cir. 1972); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *First National Bank v. Richardson*, 484 F.2d 1369, 1377 (7th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 293-94 (8th Cir. 1972); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974); *Davis v. Morton*, 469 F.2d 593, 596 (10th Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1111-15 (D.C. Cir. 1971).

At the agency level, NEPA is becoming well integrated. There has been "a rapid evolution of agency compliance," according to a recent CEQ study on NEPA implementation, resulting in "significant benefits" to planning and decisionmaking.¹⁵ CEQ concludes:

The Congressional remedy proved effective. Federal agency procedures to build NEPA into their planning and

¹⁵COUNCIL ON ENVIRONMENTAL QUALITY, THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 626, 628 (1975) (hereafter 1975 CEQ ANN. REP.). Caldwell, *supra* note 3, at 50030.

Roger Cramton, while Chairman of the Administrative conference of the United States, earlier confirmed the trend:

decisionmaking now affect all levels of government The resulting analysis of environmental effects and alternative proposals — and the public disclosure of such information — have proved workable and critical parts of environmental protection policies.¹⁶

Agency support for NEPA and recognition of its benefits is well established. At the 1975 House Oversight Hearings, each of the six agencies testifying expressed a commitment to NEPA objectives and procedures, notwithstanding some problems encountered in their implementation.¹⁷

¹⁵(Continued)

[T]he Act has produced ... a dramatic change in the perspectives of a number of Federal agencies. Even more change — the steady, sure change that is the result of building into the decision-making process new inputs, values and arguments — is around the corner. *Joint Hearings on the Operation of the National Environmental Policy Act of 1969 Before the Senate Comm. on Public Works and the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. 412 (1972). See also, R. Cramton and R. Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973); 1972 CEQ ANN. REP. at 255-59.

But the reform is by no means complete. See F. Anderson *The National Environmental Policy Act* in *FEDERAL ENVIRONMENTAL LAW* 246-48 (E. Dolgin and T. Guilbert eds. 1974); E. Strohbehn, *NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change*, 4 *ECOLOGY L. Q.* 93 (1974).

¹⁶1975 CEQ ANN. REP. at 628. Subcommittee Chairman Leggett observed:

Overall compliance with NEPA is generally improving as agencies incorporate and integrate environmental factors into their planning and decisionmaking processes.

1975 NEPA Oversight Hearings at 2.

¹⁷CONGRESSIONAL RESEARCH SERVICE, ADMINISTRATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT: SUMMARY OF 1975 OVERSIGHT HEARINGS AND STATEMENT OF COMMITTEE FINDINGS AND RECOMMENDATIONS 47 (1975).

In the hearings, Petitioner Army's Corps of Engineers stated it "fully supports" NEPA and stressed that "environmental considerations ... must be an integral part of the planning and decisionmaking process." 1975 NEPA Oversight Hearings at 3, 5. The Forest Service, of Petitioner Agriculture, testified that "the preparation of environmental statements

The Department of Interior, Petitioner herein, recently summarized the importance and effectiveness of the EIS process as follows:

The EIS has a very definite influence upon Interior's decision process and upon decisions. First, it paces the process, causing intensification of the planning and plan coordination before an adequate statement can be prepared. ... It has a very significant effect in surfacing the more detailed, specific, and quantified information that a proper plan document requires, but formerly seldom achieved in surfacing policy and operational issues for decision. This latter effect takes place both during and after preparation of the EIS itself.¹⁸

Other agencies strongly concur.¹⁹

¹⁷(Continued)

... is now an integral part of our decisionmaking process." *Id.* at 39. Petitioner Interior's Bureau of Land Management stated "we believe in NEPA That is not just lipservice"; "Our way of life depends on it." *Id.* at 35, 37.

The Department of Transportation, which has prepared more EISs than any other agency, stated that "NEPA has had a major and beneficial effect on the Department's activities and environmental impact statements have played a central role in our decisionmaking process." *Id.* at 51. The Environmental Protection Agency described as "vital" NEPA's requirement for "incorporation of environmental concerns into the Agency decision-making process." *Id.* at 69. The Department of Housing and Urban Development credited the Act with bringing about "an improved end product" in its planning and projects. *Id.* at 85.

¹⁸Response of Department of Interior to CEQ Questionnaire (Question 2.02), published in vol. 5, 102 MONITOR 5-6 (June 1975).

¹⁹Other federal agencies responding to the CEQ questionnaire stated that the EIS process has "had a major influence on many decisions," "greatly broadened the planning perspective," caused many detrimental projects to be "significantly modified, re-evaluated, delayed or stopped," "stimulated more interdisciplinary involvement" and "resulted in better thought-out decisions." *Id.* at 4-5 (Responses of Department of Transportation, Soil Conservation Service, Army Corps of Engineers, Forest Service).

Questions about NEPA's value occasionally arise when it appears projects are held up by EIS procedures, leading to criticism of the Act for causing "delay" or increased "cost." These objections have been painstakingly investigated by CEQ and refuted.²⁰ Delays attributable to the Act's requirements, as opposed to agency "inefficiency in organizing and using the EIS process," have been "virtually eliminated," and the key factor in eliminating delay has been for the agency to begin environmental studies and EIS preparation "early" in the planning process of the program or project, CEQ concludes.

The effect of NEPA litigation in delaying federal projects has been "overplayed," according to the statistical analysis by CEQ; "only a small percentage of EISs do become the subject of litigation" and cases in which the courts have enjoined agency action for any period of time "constitute only a small proportion of the total cases."²¹ Furthermore, court interpretation of the Act has played and will continue to play a vital role in insuring the Act's success; "achievements under the Act owe as much to judicial enforcement as to administrative initiative."²²

The costs of compliance with NEPA are "relatively small compared to annual budgets or to the costs of major construction or licensing projects," CEQ concludes.²³ Further, even these "costs" have not been balanced against the dollar and resource savings inherent in NEPA compliance, from

²⁰1975 CEQ ANN. REP. 634-40; 1975 NEPA Oversight Hearings at 204, 208-09. Caldwell, *supra* note 3, at 50033.

²¹1975 NEPA Oversight Hearings at 209.

²²Caldwell, *supra* note 3, at 50031; F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT viii-ix, 275-92 (1973).

²³For example, Petitioner Interior's Bureau of Land Management incurred FY 1974 NEPA costs representing only 1.3% of its annual budget; for Petitioner Agriculture's Forest Service the cost was 2.7% of budget; for Petitioner Army's Corps of Engineers, 1.2%. The Nuclear Regulatory Commission's 1975 NEPA costs equaled only 2.2% of the cost of a single, average-size nuclear power plant. 1975 CEQ ANN. REP. at 635-37.

project eliminations and modifications and from environmental, social and economic costs avoided by sound, advance planning.²⁴

While the Congressional purposes of NEPA and the positive effects of NEPA compliance on agency planning and decisionmaking are clear, important issues of EIS scope and timing are presented in this case. The basic conceptual problems presented by Petitioners' arguments in this case raise a serious challenge to the continued effectiveness of NEPA.

III. THE SCOPE AND TIMING OF EIS ANALYSIS IS CRITICAL TO EFFECTUATE CONGRESS'S INTENT

The EIS — the "action-forcing" mechanism employed by NEPA — is a vital, but vulnerable, device upon which to rest Congress's intention to reform federal planning and decision-making. EISs, when properly prepared, have proved vital in fostering sound environmental planning and decisions. But the process is vulnerable to court and agency interpretations which restrict the scope and defer the timing of the required environmental statement to the point that it is no longer a part of the actual policy development, planning and decision-making of the agency, but only a post facto justification for decisions already made.

Congress clearly intended NEPA to be comprehensive in scope, applying not only to "project proposals" but also to "policy statements" and "programs."²⁵ Congress also

²⁴For example, the Corps of Engineers has decided to stop or abandon 18 projects and has modified 174 other projects, as a result of its EIS analyses. Letter from Henry L. T. Koren, Deputy Under Secretary of the Army, to Russell W. Peterson, Chairman, CEQ, January 16, 1975. Other agency examples abound. 1975 CEQ ANN. REP. at 628-31; 1972 CEQ ANN. REP. at 226-27.

²⁵S. REP. NO. 91-296 at 20.

intended NEPA to be applied at the most basic, "early stages of planning."²⁶

It is universally accepted that NEPA requires policy-level, programmatic and regional EISs (collectively "program EISs")²⁷ depending on the facts of the particular situation and how the actual planning and decisionmaking process is shaped.

The program EIS requirement must be understood as a part of a multi-level EIS analysis:

[T]he first statement prepared would cover pending legislation or broad, new federal policies; statements to follow would be prepared as each distinct initiative in implementing the legislation or policy was formulated.

²⁶*Id.*, Senator Church commented:

[NEPA] marks an effort for the first time to impress and implant on Federal agencies an awareness and concern for the total environmental impact of their actions and proposed programs. *This awareness will be built into the agencies' planning processes at the lowest levels, where, as we all know, most decisions are formulated and even finalized.*

115 CONG. REC. 29059 (1969) (emphasis added). Then Secretary of Interior Walter J. Hickel emphatically agreed with this philosophy:

Development of our natural resources as commodities must protect other resource values. . . . To accomplish this goal, we must build environmental values into the development process *from the beginning.*

1969 Senate Hearings, *supra* note 8, at 75 (emphasis added). The CEQ Guidelines repeatedly stress the need for early EIS compliance. 40 C.F.R. §§ 1500.1(a), 1500.2(a), 1500.2(b), 1500.7(a).

²⁷A "program" EIS is one which analyzes a broad federal policy or a multi-component initiative such as the licensing or construction of a series of projects, related to each other operationally or by their cumulative impacts on a given area. See, Comment, *Planning Level and Program Impact Statements Under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124 (1975); F. Anderson, *supra* note 15, at 335-38; 1972 CEQ ANN. REP. 233-34.

The later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the wider, policy-oriented statements for their treatment of far-ranging alternatives and basic federal policy.

Numerous advantages could be obtained through this approach. It would establish a record of least-cost, gradually circumscribed decision making without subjecting the agency to reconsideration of basic principles each time a specific action was contemplated.²⁸

The U.S. Forest Service has adopted this multi-level approach with reported success,²⁹ and Petitioner Department of Interior endorses the method:

Although the Department's procedures do not explicitly recognize various levels [of EISs], Interior was perhaps the first agency to implement the concept of a covering program environmental statement with separate project-type statements that were lower in hierarchical scale as they became more specific in nature (e.g., [Bonneville Power Administration's] construction program, off-road vehicle regulations, the oil shale program, the Eastern Powder River coal development). Depending upon the particular program involved we have utilized: (1) nationwide program statements at the highest order of scale, (2) area or regional statements with a specific geographic extent, and (3) statements at the site construction or implementation level such as development concept plans, power plant site construction, etc.³⁰

²⁸F. ANDERSON, *supra* note 22, at 290. See also, 1972 CEQ ANN. REP. 233-34.

²⁹1975 NEPA Oversight Hearings at 39-40.

³⁰Response of Department of Interior to CEQ Questionnaire (Question No. 3.01) (CEQ public files, 1975). Interior further stated:

We believe also that we can see a definite improvement in the planning process itself as well as in plan implementation because of program environmental statements. This is because the program statement focuses planning attention more forceably on repetitive, aggregative, and cumulative problems.

Id., Response to Question No. 2.03.

The multi-level approach is critical to effectuate NEPA's goals. First, it accurately reflects (and encourages) the real-world decision process, from basic goal setting to evaluation of alternative means. Second, early articulation of policy or program goals permits public scrutiny and decreases the tendency toward incremental or segmented decisionmaking. Third, it permits a broad spectrum of alternatives to be analyzed early in the planning process before important alternatives are eliminated. Finally, subsequent, more specific EIS stages can be prepared with greater efficiency by building upon and updating the data and decisions made in the earlier statements.³¹

Contrary to its perceptive comments about program/regional EISs and multi-level analysis, Interior in this case seeks to avoid one of these essential steps — an EIS covering energy-related federal management in the Northern Great Plains. Interior presents two standard arguments: (1) The Northern Great Plains region is not the relevant geographic scope for Interior policy-making and planning and (2) even if it is, the timing is not ripe for a regional EIS because no formal regional "plan" has yet been developed or "proposed." These assertions fly in the face of two of the most essential precepts of NEPA — (1) that the requisite scope for compliance is the scope of the policy underlying the action, and (2) that environmental analysis must come at the earliest possible stages in the planning process.

A. THE PROPER SCOPE FOR THIS LEVEL OF EIS ANALYSIS IS THE NORTHERN GREAT PLAINS REGION.

Elsewhere, Interior has correctly described the necessary NEPA analysis as encompassing: (1) a "national program statement," followed by (2) "regional statements," and finally (3) "site" or project-level statements.³² Interior is attempting, in this case, however, to avoid the requirement for regional EIS analysis by confusing that intermediate level analysis with

³¹See, 3 ECOLOGY L. Q., *supra* note 9, at 808; 23 U.C.L.A. L. REV., *supra* note 27, at 162; F. ANDERSON, *supra* note 22.

³²Text accompanying note 30, *supra*.

the site-specific level and by claiming the latter as a substitute for both. This is plainly in conflict with Interior's actual policy and planning treatment of the region and with sound NEPA analysis.

To date, Interior has produced an EIS purporting to cover coal leasing nationally³³ and a project-level EIS covering a limited number of specific coal leases and related power/rail projects.³⁴ In neither EIS is assessment made of the actual scope of energy-related federal management policies and actions for the Northern Great Plains region which is underlain by the coal resources of the Fort Union Formation (Eastern Montana—Wyoming and Western Dakotas). In neither have certain fundamental issues been analyzed — whether energy developments should be concentrated or dispersed; whether strip mining should be restricted to areas where reclamation potential is best; whether deep mining is feasible; how scarce water supplies should be allocated between energy development, agriculture, fish and wildlife, and navigation.

Finally, none of these EISs analyze the cumulative impacts of development on the region as a whole.

Significant federal policies and actions, and their consequences, are being omitted from NEPA consideration. Equally seriously, this "telescoping" wholly fails to reflect the actual, real-world policies and planning of the Government, which are clearly focused on the region as an entity.

³³U.S. DEPT. OF INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED COAL LEASING PROGRAM (1975). For a critical review of this EIS, see THE INSTITUTE OF ECOLOGY, A SCIENTIFIC AND POLICY REVIEW OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED FEDERAL COAL LEASING PROGRAM (K. Fletcher ed. 1974).

³⁴U.S. DEPT. OF INTERIOR, FINAL ENVIRONMENTAL STATEMENT: PROPOSED DEVELOPMENT OF COAL RESOURCES IN THE EASTERN POWDER RIVER COAL BASIN OF WYOMING (1974).

Interior's actual policy of treating the Northern Great Plains as a discrete region for development of coal has been manifested on numerous occasions, dating back at least as early as the Secretarial "policy directive" of 1973. The policy directive was restated as follows in Interior's program Decision Option Document on Coal Leasing in December 1975:

Over the past two years, Federal coal leasing actions have been processed in accordance with a policy directive by Secretary Morton of January 24, 1973. . . . In part the January 24, 1973, directive states:

" . . . all actions of any kind regarding development of coal related to the Southwest and Northern Great Plains covered by the June 16, 1971 and June 30, 1972 memoranda . . . shall be submitted to the Under Secretary for review and concurrence prior to execution."

The June 30, 1972, memorandum refers to coal reserves in the Fort Union Region of Montana, North Dakota, South Dakota, and Wyoming

It is appropriate at this time to review this policy directive given the possible decision to begin leasing actions on an expanded scale.³⁵

Interior's policy for augmented coal development throughout the Northern Great Plains as a region was reaffirmed in the recent testimony of the Secretary of Interior before the U.S. Senate in February:

[G]iven that significant reserves are under lease and given that we can expect additional leasing and development in the Northern Great Plains due to intense industry interest, the value of regional and sub-regional planning for the development of federally leased reserves

³⁵BUREAU OF LAND MANAGEMENT, PROGRAM DECISION OPTION DOCUMENT: THE PROPOSED FEDERAL COAL LEASING PROGRAM 74 (December 16, 1975) (emphasis added).

remains of high priority. Therefore, Interior reaffirms its commitment to study the regional or sub-regional socio-economic and environmental impacts of coal leasing and development.

Examples of this commitment in action are the comprehensive reports of the Northern Great Plains Resources Program, the policy announcement to prepare regional coal and coal related environmental impact statements³⁶

Other examples of Interior's actual "commitment" to a regionwide development policy include its REPORT ON WATER FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA (1975). That report "encompass[es] 63 counties in Wyoming, Montana, North Dakota, and South Dakota" and states that its purpose is specifically to "assist management officials in making decisions on site-specific energy development" in the area (at vii).

Secretary Kleppe has summed up the contradiction undermining Interior's opposition to a Northern Great Plains regional EIS:

We deny that we are controlling the development of resources in a region. Rather we intend only prudent management of Federal coal resources.³⁷

It is precisely these policies, programs and decisions for "prudent management" of federal resources in the Northern

³⁶Written response of Secretary of Interior Thomas S. Kleppe, to Question #3 submitted by the Subcommittee, *Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs* (February 16, 1976) (emphasis added).

³⁷Testimony of Secretary of Interior Thomas S. Kleppe, *Hearings, supra* note 36, typescript page 12 (emphasis added).

Great Plains which have not been analyzed under NEPA, frustrating the most basic and obvious intent of Congress.

B. THE PROPER TIMING OF THIS REGIONAL EIS IS NOT DICTATED BY *SCRAP II*.

The Government's argument in this case rests entirely on its claim that no "proposal" now exists for major federal action with respect to energy resources of the Northern Great Plains. (Federal Petitioners' Brief at 2-3.) Absent such a proposal, say Petitioners, no EIS is required under this Court's holding in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 322 (1975) (*SCRAP II*). But an agency's conclusory denial that a policy, program or plan exists does not, in itself, resolve the issue. A federal proposal may be both distinct and comprehensive even where an agency has not formally announced steps toward its realization. As the Court of Appeals noted below (514 F.2d at 873):

At a minimum, the courts must reserve the right to analyze federal actions to determine if, in fact, a comprehensive program, however labeled, is underway or proposed.

The Court of Appeals correctly ruled (514 F.2d at 878):

It is our view that when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to "control development" of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a "plan," a "program," or nothing at all.

It held, as a matter of law, that "comprehensive major federal action is contemplated in the Northern Great Plains" (514 F.2d 878), that is, a de facto "proposal" for regional management exists, the Government's denial notwith-

standing.³⁸ The remaining question the Court of Appeals faced was the question of timing — whether development of the program is ripe for preparation of an EIS. On this point the Court remanded to update the record.

The danger to NEPA posed by the Petitioners' argument in this case stems not merely from their limited view of what constitutes a "proposal," but also from their interpretation of this Court's holding in *SCRAP II* with respect to the time at which an EIS must be prepared.

In *SCRAP II*, under applicable ICC rules, the railways as private entities initiated freight rate increases through self-revised rate schedules. Plaintiff environmental groups challenged these rates as discriminating against recycled materials. At issue was the stage in the proceedings where the ICC's reaction to the privately proposed rate increases became sufficiently defined to constitute a "proposal" for federal action, requiring an EIS. Emphasizing that the agency had "made no proposal" and was not involved in planning the increase, this Court held that the final EIS was not required until the ICC made its "recommendation or report" on its own "proposal" for a federal action. 422 U.S. at 320-321. Given the unique character of the ICC proceedings, the federal "proposal" for NEPA purposes was held to be the actual recommendation approving or disapproving the railway's unilateral action; the "recommendation" and "proposal" were, under the circumstances of this regulatory review, one and the same.

³⁸While Petitioners make much of the Court of Appeals' use of the word "contemplated" — arguing that contemplation is too vague to constitute action (Federal Petitioners' Brief at 24, 39-42) — it is clear that the Court was using "contemplated" as synonymous with "planned" just as the *CEQ Guidelines* do:

The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action *proposed*, related Federal actions and projects in the area, and further actions *contemplated*.

CEQ Guidelines, 40 C.F.R. §1500.6(a) (emphasis added), cited by the Court, 514 F.2d at 871; see also, 514 F.2d at 879.

Unlike the instant case, *SCRAP II* presented no questions of federal agency program or project planning; nor was it a case in which the concerned agency was directly involved in resource development through construction programs, licenses, permits, options and rights of way; nor were irretrievable commitments of resources being made. In short, the ICC's role entailed only reactive review, totally inapposite to the role of Petitioners in this case. The *SCRAP II* opinion expressly recognizes its inapplicability in contexts such as this. The Court pointed out that where the agency initiates a proposal "the statute would appear to require an impact statement to be included in the proposal" prior to any agency report or recommendation. 422 U.S. at 32.

Thus, *SCRAP II* is not at issue in this case. Even if it were held that federal agencies could postpone EIS preparation until they actually made their decisions — which *SCRAP II* certainly did not hold — a regional EIS would nevertheless be required in this case. The Department of Interior has already issued numerous mining leases, executed water option contracts, granted rights-of-way and approved at least seven mining plans in the region without preparation of the regional EIS required by NEPA. 514 F.2d 864-66, 875. The case is far beyond the "proposal" stage of *SCRAP II*. The numerous, related federal decisions that have been made and, with this Court's lifting of the injunction, are being and will be made clearly necessitate a regional EIS.

Petitioners, however, would have this Court declare that the holding in *SCRAP II* flatly governs the timing requirement for preparation of EISs of *all* federal agencies. In effect, Petitioners are arguing that *SCRAP II* allows agencies to defer EIS preparation until the terminal stages of agency planning and decisionmaking — when the agency admits to having a *formal, final recommendation for action*. To read one phrase in Section 102(2)(C) as permitting postponement of NEPA compliance until critical planning is completed, decisions made and options foreclosed is directly contrary to the most basic Congressional purpose of the Act. And the Congressional purpose must control interpretation of the Act. *Environmental Defense Fund, Inc. v. TVA*, *supra*, 468 F.2d at 1173; *Richards v. U.S.*, *supra*, 369 U.S. at 11; *SEC v. C. M. Joiner*

Leasing Corp., *supra*, 320 U.S. at 350-51. Certainly, the EIS must be available in time to be "include[d] in [the] recommendation or report on [the] proposal." But it must be prepared early enough in the proposal formulating process so that the ultimate proposal and recommendation thereon are formulated, analyzed and decided with the benefit of the "action-forcing" analysis required by the EIS.

Petitioners' attempts to extend *SCRAP II* to their actions is not merited on the facts of this case and has been explicitly rejected by the Council on Environmental Quality, the agency charged with overseeing NEPA compliance. Responding to the problems of applying *SCRAP II*'s ICC guidance to other agencies, with vastly different mandates and procedures, CEQ issued the following advisory opinion:

SCRAP presented unique facts and a narrow decision. The ICC's three types of proceedings — a broad investigation of the entire rate structure, a concurrent review of the incremental rate increase, and the opportunity for parties to challenge specific increases — are not characteristic of most agencies. . . .

Procedurally, the Court stated that final statements [EISs] are due when a federal "proposal" exists. But the Court did not define what a "proposal" is or provide other guidance for identifying federal proposals.

In view of the ambiguity of the definition of "proposal" and the narrow facts of the case, the Council recommends no general change in agency NEPA procedures.³⁹

The timing of impact statements is not susceptible to a simple, categorical rule that will cover all situations and all agencies. This was properly recognized by this Court in

³⁹Memorandum to the Heads of Agencies from R. Peterson, Chairman, Council on Environmental Quality (November 26, 1975), reprinted in 1975 NEPA Oversight Hearings at 246, 247. Accord, Comment, *SCRAP II: No Excuse for NEPA Foot-Dragging*, 5 ENV. L. REP. 10126 (1975), reprinted in 1975 NEPA Oversight Hearings at 239-46.

SCRAP II (422 U.S. at 320) and by the Court of Appeals, below, in developing its four-part "balancing" test for ripeness: (1) likelihood of program implementation, (2) availability of information, (3) irretrievability of commitments, and (4) severity of ultimate environmental effects. 514 F.2d at 880; *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1094 (D.C. Cir. 1973).

The balancing approach recognizes that NEPA's effectiveness depends upon integrating the EIS analysis into the actual planning and decisional process of the agency. As the Court noted (514 F.2d at 882, n. 35):

The impact statement is intended to aid agency planning and decision-making *before* the final recommended proposal for action is made. (Emphasis in original.)

CEQ has repeatedly stressed the need for *early* EIS preparation to effectuate the Congressional intent. In testimony before Congress in 1975, CEQ Chairman Peterson testified:

[T]he environmental impact statement process has significantly changed and improved Federal decision-making. . . . [T]oday people are integrating the NEPA process early in their decisionmaking. *They are making changes in the plans before they adopt proposals, as a result of the studies and investigations which the Act envisioned.*

. . . .

*Federal agencies differ in the kind of decisions they must make and in the time when they must make them. It has been CEQ's job to help provide general EIS guidelines for all these different situations consistent with the need for useful statements at the earliest appropriate stage.*⁴⁰

⁴⁰1975 NEPA Oversight Hearings at 212-13 (emphasis added).

Were the preparation of EISs held categorically to await the agency recommendation on a final proposal, the EIS would fail to serve the very purpose for which Congress intended it -- to force agency *implementation* of the environmental goals established in Section 101 of NEPA.

The generality of Section 102(2)(C)'s language is purposeful. It is designed to allow the timing of the EIS to be adjusted to cover varied actions and grossly dissimilar agency processes. The balancing test developed by the Court of Appeals, below, represents the most significant and successful attempt to date to provide a standard for determining when federal policies, programs, plans, and actions have reached the stage where the "action-forcing" EIS of Section 102(2)(C) is required to meet the environmental goals in Section 101.

III. CONCLUSION

For the foregoing reasons, we join Respondents in urging that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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APR 9 1976

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,
v.

SIERRA CLUB, ET AL.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,
v.

SIERRA CLUB, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF AMICUS CURIAE OF JOHN D. DINGELL
(U.S. REP., 16th DIST. MICHIGAN)

JOHN D. DINGELL
Member of this Court's Bar

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
v. *Petitioners,*

SIERRA CLUB, ET AL.,
Respondents.

No. 75-581

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
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SIERRA CLUB, ET AL.,
Respondents.

**MOTION OF JOHN D. DINGELL FOR LEAVE
TO FILE BRIEF AMICUS**

Movant, John D. Dingell, respectfully moves this Court for leave to file the annexed Brief *amicus curiae*. He has filed with the Clerk of this Court: (a) the letter of Respondent's counsel consenting to the filing of this Brief; and (b) the letter of Petitioner's counsel, Solicitor General Bork, refusing to consent to the filing of this Brief.

The reasons for this motion are:

Movant, now and since December 1955 a Member of the U.S. House of Representatives from the 16th Congres-

sional District of Michigan, has been intimately involved in the development, enactment and legislative oversight of the principal statute involved in this case, the National Environmental Policy Act of 1969 (NEPA). Movant authored the bill, chaired the Subcommittee of the House Merchant Marine and Fisheries Committee which held hearings on the bill, and acted as Floor Manager for the bill when the House passed it. He was a member of the House-Senate Conference Committee which produced the present text of NEPA, and Floor Manager of the Conference Report in the House. Subsequently, he chaired the House Subcommittee which held numerous oversight hearings and investigations concerning the administration of NEPA. As the present Chairman of the Energy and Power Subcommittee of the House Interstate and Foreign Commerce Committee, he has closely observed the relationship between NEPA and the nation's energy needs.

This case involves issues concerning the scope and application intended by Congress with respect to NEPA and its required environmental impact statements (EIS), particularly as concerns the development of coal production on Federal lands to meet the nation's energy needs.

Movant believes his brief contains information which would assist this Court in this case, and which is not adequately explicated in the briefs of the parties or of the other *amici* in this case.¹

¹ It is significant, and ironic, that the Solicitor General, while refusing consent to the filing of movant's brief *amicus*, has granted consent to the filing of *amici* briefs by at least the following: Carter Oil Company; American Public Power Association, et al.; Utah Power and Light Company; Pacific Legal Foundation; Western Fuels Association, Inc., et al.

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IN THE Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

No. 75-581

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

BRIEF OF JOHN D. DINGELL
UNITED STATES REPRESENTATIVE FROM MICHIGAN
AS AMICUS CURIAE

This brief supports the position of Respondents that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., mandates preparation of an environmental impact statement covering energy resource development in the Northern Great Plains.

DESCRIPTION AND INTEREST OF THE AMICUS CURIAE

John D. Dingell, now and since December 1955, a Member of the U.S. House of Representatives from the 16th Congressional District of Michigan, has been intimately involved in the development, enactment and legislative oversight of the principal statute involved in this case, the National Environmental Policy Act of 1969 (NEPA). He authored the bill, chaired the Subcommittee of the House Merchant Marine and Fisheries Committee which held hearings on the bill, and acted as Floor Manager for the bill when the House passed it. He was a member of the House-Senate Conference Committee which produced the present text of NEPA, and Floor Manager of the Conference Report in the House. Subsequently, he chaired the House Subcommittee which held numerous oversight hearings and investigations concerning the administration of NEPA. As the present Chairman of the Energy and Power Subcommittee of the House Interstate and Foreign Commerce Committee, he has closely observed the relationship between NEPA and the nation's energy needs.

ARGUMENT

- I. The Congress enacted the National Environmental Policy Act of 1969 to establish a national environmental policy and implementing law which would redirect Federal policies, programs, and activities.

The National Environmental Policy Act was the product of Congressional concern about the Nation's ubiquitous environmental problems. The scope of the problems and the degree of Congressional concern with these problems are clearly noted in the House Report on H.R. 12549, the House counterpart to S. 1075:

" 'By land, sea, and air, the enemies of man's survival relentlessly press their attack. The most dangerous of all these enemies is man's own un-directed technology. The radioactive poisons from nuclear tests, the runoff into rivers of nitrogen fertilizers, the smog from automobiles, the pesticides in the food chains, and the destruction of topsoil by strip mining are examples of the failure to foresee and control the untoward consequences of modern technology.'

"Thus spoke the New York Times in an editorial on May 3 of this year. The editorial, which endorsed the type of legislation embodied in H.R. 12549, may understate the complexity and urgency of the challenge. The problem is deep, and it touches on practically every aspect of everyday life: economic, scientific, technological, legal, and even interpersonal. It is a problem to which Presidents have addressed themselves with increasing concern in recent years, and it is a problem which we can no longer afford to treat as of secondary importance." [H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969)]

The report of the Senate Interior and Insular Affairs Committee, on the bill (S. 1075), stated the same view:

"As a result of this failure to formulate a comprehensive national policy, environmental decisionmak-

ing largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small, but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.

"Today, it is clear that we cannot continue on this course. Our natural resources—our air, water, and land—are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear." [S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).]

Similar views were expressed in the Senate during the debate on the Conference Report [H.R. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969)] on S. 1075. Senator Jackson, the Floor Manager, stated:

"... This measure is important because it provides for new approaches to dealing with environmental problems on a *prevention* and *anticipatory* basis. As Members of the Senate are aware, too much of our past history of dealing with environmental problems has been focused on efforts to deal with 'crises' and 'reclaim' our resources from past abuses... We see increasing evidence of (environmental mismanagement) all around us;" (emphasis added) [115 Cong. Rec. 40147 (1969)]

Thus, both Houses enunciated similar misgivings about the manner in which the Federal Government was managing our environmental resources and the need for fundamental, institutional reform and comprehensive environmental planning. Their comments were directed not toward single Federal projects or incidental Federal

actions, but rather toward the broader impacts of Federal action on the overall environment.

The bold and innovative declaration of national policy, as stated by the Congress in section 101 of the National Environmental Policy Act, leaves little doubt that a massive and sustained effort would be required to redirect the Nation's environmental priorities. In this "Declaration of National Environmental Policy," the Congressional statement of findings, upon which the law's requirements are based, contains reference after reference to the need for remedying abuses of the past and the necessity for continuing these efforts in the future.

"The Congress, recogniz[es] the profound impact of man's activity on the . . . natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances . . ." [Sec. 101(a).]

The Congress:

"... recogniz[ed] further the critical importance or *restoring and maintaining* environmental quality... [and] declare[d] that it is the *continuing policy* of the Federal Government . . . to use all practicable means and measures . . . to *create and maintain* conditions under which man and nature can exist in productive harmony, and fulfill the . . . requirements of *present and future* generations of Americans." [Sec. 101(a).] (Emphasis added.)

It was on account of this perceived Federal environmental morass that the new direction was mandated by NEPA. It is evident that the Congress felt strongly about the need for Federal agencies to reexamine their policies, programs and activities when it enumerated their duties in section 102(2):

"102(2) . . . all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in *planning* and in *decision-making* which may have an impact on man's environment;

(B) Identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in *decisionmaking* along with economic and technical considerations;

(D) Study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(G) Initiate and utilize ecological information in the planning and development of resource-oriented projects." (Emphasis added.)

Not only were the Federal agencies directed to adopt new environmental responsibilities as enumerated by Congress, but further the agencies were explicitly required in section 103 of the Act to reassess their missions and report to Congress their own recommendations for improvement:

"All agencies of the Federal Government shall review their statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971 such measures as may be necessary to bring their authority and policies into conformity

with the intent, purposes, and procedures set forth in this Act."

Professor Lynton K. Caldwell, of Indiana University, who assisted the Senate Committee on Interior and Insular Affairs in the drafting of the National Environmental Policy Act, stated in a December 1975 workshop paper on the implementation of NEPA that section 103, although it had been neglected by the agencies, nonetheless contained continuing authority for agencies to correct their environment-affecting missions. Caldwell states that:

". . . Unfortunately, because the agencies were required by law to report to the President by July 1, 1971 (the actual date was qualified by Administrative action) this section has been assumed to have a one-time applicability. As might have been expected, few agencies found anything in their statutory authority, regulations, or policies that they would propose to change. As a corrective, section 103 appeared to be ineffectual, but it could embarrass agency attempts to avoid compliance with NEPA on grounds of conflicting mandates." [House Comm. on Merchant Marine and Fisheries, Workshop on the National Environmental Policy Act, Serial No. 94-E, 94th Cong., 2nd Sess. (1976).]

In its first oversight report on NEPA, the House Merchant Marine and Fisheries Committee expressed its concern that the initial reviews under section 103 were not satisfactory, but that efforts to implement the provisions should be carried further:

". . . Exactly how these reviews were to be handled internally was left to the individual agencies. *This lack of specific guidance, however, should not have been construed as relaxing the Congressional mandate . . .*

"The problems recognized above demonstrated to the Committee the need for more thorough agency review efforts under section 103 . . .

In the Committee's view, section 103 offers an excellent mechanism for the creation of . . . agency evaluation units *to assess problems and policies on a long-term basis*. The Committee also believes that the *continuation of the review process initiated under section 103* offers the prospect of improved intra-agency communication on environment-affecting actions. (Emphasis added.) [House Comm. on Merchant Marine and Fisheries, Administration of the National Environmental Policy Act (P.L. 91-190), H.R. Rep. No. 92-316, 92nd Cong., 1st Sess. 37-38 (1971).]

Most importantly, however, NEPA declares a national policy which directs Federal agencies—

“ . . . to use all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources.” [Section 101(a), 42 U.S.C. 4331 (a)]

The principal tool to implement this policy is the environmental impact statement (EIS) which is required prior to any “major Federal action which significantly affects the quality of the human environment”.

The action-forcing requirement of the environmental impact statement was to ensure the comprehensive consideration of environmental impacts early in the planning and decision-making process in order to avoid and minimize their adverse results. Had the Congress anticipated that this requirement would apply only to project level actions and not to the more comprehensive activities of a Federal agency, then there would have been little purpose in providing such an empty requirement. Clearly, it was not intended to be a *post facto* rationalization for our continued neglect of the environment.

II. Congress intended the environmental impact statement to effectuate changes in the planning and decision-making process early in the formulation of Federal proposals.

Congress adopted the environmental impact statement requirement “to assure that all Federal agencies plan and work towards meeting the challenge of a better environment.” [Senate Rep. No. 91-296, 91st Cong., 1st Sess. (July 9, 1969)]. The timing of the EIS preparation is vital to attain NEPA's goals as expressed in section 101. Thus, in requiring Federal agencies to consider environmental factors in reaching a decision to undertake an action, NEPA seeks to affect the mode by which a decision is rendered as well as its end-product.

The language of section 102(2)(C) requires that an environmental impact statement be *included* in every recommendation or report on proposals for major Federal actions and that the statement, with comments, accompany a proposal through the agency review process.

Because Congress recognized that the Federal agencies vary enormously in their procedures and actions, Congress did not define the term “proposal” or prescribe the specific time at which the EIS should be prepared. Instead, Congress enacted NEPA with the clear purpose that the EIS process be used *during* the planning and decision-making, at a sufficiently early stage to affect such planning and decision-making. The clearest statement as to when the EIS must be prepared is in *Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 418 F 2d 1079, 1094 (D.C. Cir. 1973):

“Statements must be written late enough in the process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decisionmaking process.”

Congress clearly intended that all provisions of NEPA be interpreted so as to effectuate to the greatest extent possible the policies established by the Act.* The impact statement process was not intended to be a mere overlay on decisions already made.

The requirement of early EIS preparation is one of the essential elements of the NEPA process. If decision-makers are expected to seriously consider the environmental impacts of their actions in a timely fashion, their early planning and decisions, as well as their ultimate decisions, must be made in full view of the available facts.

The most critical finding made during the Congressional oversight hearings on the implementation and administration of NEPA, chaired by Congressman Dingell in 1970 and 1972, was the importance of applying a "systematic interdisciplinary approach" to agency planning and decisionmaking, coupled with full public disclosure of relevant facts in the *early* decisionmaking process. In fact, the impact statement process itself was found to be as important as the ultimate EIS manuscript. [Hearings on Administration of the National Environmental Policy Act before Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, H.R. Rep. No. 91-41, 91st Cong., 2nd Sess. (1970) and H.R. Rep. No. 92-24, 92nd Cong., 2nd Sess. (1972)].

The petitioners contend that no EIS is required in this case because, they say, the Federal agencies have

* NEPA specifically requires that Federal laws, regulations, and policies be administered in accordance with its policies. (Section 102(1)).

The Conference Report on S. 1075 unequivocally states that Federal agencies must comply with the policies set forth in NEPA "to the fullest extent possible" and that this language shall not be used as a means of avoiding compliance with NEPA's directives. H.R. Rep. No. 91-765 on S. 1075, 91st Cong., 1st Sess. (1969).

not yet made a "report or recommendation" on any "proposal". Such argument is essentially a play on words. If those words mean—as the petitioners seem to argue—a formal report on a program which the agency denominates as its proposal for the action it has decided upon, and that the EIS need not be prepared until the agency's report or recommendations are ready, then the purpose of NEPA's EIS will have been substantially subverted. It would result in deferring the agency's EIS to a fatally late point in its decisionmaking process.

The intent of NEPA and its application should not be circumvented by the Federal petitioner's fragmented, disjointed approach to the development to the Northern Great Plains Region. A comprehensive, systematic approach to the development of national programs has not been a characteristic of the normal Federal decisionmaking and implementation process. Quite to the contrary, the myriad of Federal policies and programs have frequently worked at odds with one another. This very fact was a compelling reason for the Congress to enact a law that cut across all functional lines of our Federal system. [Senate Comm. on Interior and Insular Affairs, Hearings on S. 1075, 91st Cong., 1st Sess. at 116 (1969)]. For the petitioners to argue that NEPA should not be applied absent a Federally sanctioned formal "proposal" would be to defeat the very reason for which this statute was enacted and signed into law.

As NEPA was first implemented, an important question facing the agencies was whether several Federal actions, which may by themselves be minor in consequence but taken together would significantly affect the environment, would constitute a major Federal action for which the agency must prepare an EIS. This question was resolved by the Council on Environmental Quality, the agency established to oversee the administration of the EIS requirement. Its guidelines state that

the statutory words "major Federal action" must be read "with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated." 40 C.F.R. 1500.6(a) (1974). The Guidelines explained that minor Federal actions can be cumulatively considerable:

"... when one or more agencies over a period of years puts into a project individually minor but collectively major resources," or when ... one decision involving a limited amount of money is a precedent for action in much larger cases,"

or when one decision

"... represents a decision in principle about future courses of action, or when several Government agencies individually made decisions about partial aspects of a major action." [40 C.F.R. 1500.6(a)].

Viewed in another way, the phrase "major Federal action" connotes both a certain magnitude of activity and a certain nexus between that activity and the United States Government. The term "action" is not limited merely to a single deed, but can include a pattern or series of acts that seem to the perceiver to be part of a single undertaking. An analogy might be drawn to a series of words within a sentence: although they have individual meaning, when taken together they convey a more complex thought that goes beyond the meaning of the individual words. Clearly, a series of acts need not be completed before an "action" is recognized. Moreover, an "action" can be said to exist when a series of activities reaches that stage of coherence and maturity which suggests that a decision to go forward is being made and has a reasonable possibility of being implemented. The required level of coherence and maturity would be reached when a certain intensity of focus and level of momentum can be identified.

In the case at bar, the Federal petitioners have created such focus and momentum in the numerous ac-

tions already taken related to coal development in the Northern Great Plains region.

In 1970, the Interior Department initiated its North Central Power Study. It also began a study of potential water resources in Montana and Wyoming in relation to coal development, and broadened this study in 1972 in its Northern Great Plains Resources Program concerning the social, economic and environmental aspects of coal development in that region, and issued a report thereon in August 1975. The Interior Department has in numerous instances issued coal leases, approved mining plans, granted rights of way for coal development. It is now considering applications for additional leases, mining plans and rights of way. Similar action has been and is being taken by the Corps of Engineers and the Forest Service. These studies and actions certainly provide the focus of anticipated action. Moreover, the momentum created by these allegedly unrelated actions is undeniable, and is tacitly acknowledged in this case.

In sum, Congress intended NEPA to require Federal agencies to examine, through the mechanism of an environmental impact statement, the effect of its actions on the environment. If a particular set of actions, such as those described in the present case, affect an entire region of the country, then the EIS must examine the resultant impacts and the alternatives to these actions as they affect the region.

The NEPA requirement is not satisfied by a plethora of EIS's which are restricted to local impacts, or by a generalized study concerning the nation-wide impact of a coal expansion program.

Moreover, if the application of NEPA is delayed, as Petitioners urge, until the Federal agencies make a formal proposal or something labeled a "report or recommendation" regarding a program action as important

as the development of energy resources in the Northern Great Plains, before an EIS is required, it would be undoubtedly difficult, if not impossible, to reconsider or revise the myriad of policies and decisions which support that recommendation. It is imperative that the determination whether a "proposal" exists, sufficient to require an EIS, not be dependent upon the agency's own characterization. In many cases, a formal report or recommendation on a proposal may never be forthcoming or necessary.

The final EIS must, of course, be included in any recommendation or report on proposals for major Federal action. But clearly, an EIS must be prepared early enough in the agency planning and decision-making process to assure that the "action-forcing" analysis required in 102(2)(C) is integrated with the development of a proposal.

Congress certainly did not intend that the broad language of Section 102 of NEPA be read so restrictively as to allow agency deferral of environmental analysis and statement preparation until after the agency has finalized formal proposals for action. Such an interpretation would defeat a basic purpose of NEPA by rendering the environmental impact statement nothing more than a *post facto* justification for decisions already made.

III. The development of our Nation's energy resources mandate NEPA's comprehensive, systematic, and interdisciplinary approach at several levels.

A regional programmatic EIS is appropriate in order to examine the proper scope and intensity of environmental impacts. It is especially necessary when several projects are interrelated as part of larger plans, even though each project is itself an end product which may also be the subject of an environmental analysis and report.

A multi-tiered impact statement process is desirable, if not obligatory, where several levels of impact analysis are required. It is clearly possible that even a national programmatic study, coupled with a myriad of highly detailed local analyses, might overlook or ignore the synergistic or cumulative adverse effect of these actions on the region. Just as we might have difficulty judging the size of our hand when looking through a telescope or a microscope, the selection of an inappropriate level of environmental impact analysis may unintentionally eliminate or misrepresent the true facts of some predicament.

The case now before this Court aptly demonstrates the need for comprehensive NEPA evaluation. NEPA compliance in the Northern Great Plains situation would assure the Federal Government, the Congress, and the public an opportunity to view and participate in development of a comprehensive, coherent energy development policy for the region.

Certainly, in view of the numerous interrelated Federal actions with respect to energy development in the Northern Great Plains Region, both ongoing and anticipated, it cannot be seriously argued that a regional impact statement is inappropriate in scope.

Federal actions related to Northern Great Plains energy development are not limited merely to approval of individual coal leases. The Government is also involved in issuance of rights-of-way, water option contracts and numerous permit approvals, as well as general planning for regional management of resources development. The statutes upon which these Federal actions are based, such as the Mineral Leasing Act of 1920, are to be "interpreted and administered" in accordance with NEPA's directives to the "fullest extent possible." Section 102(1). The requirement that the Federal management of energy resources in the Northern Great Plains

Region be subjected to *comprehensive* policy-level environmental analysis is completely consistent with the specific statutory authorities upon which Federal actions in the region are based. Far from being inconsistent with other statutes, the NEPA analysis required here would have the precise complementary effect on existing regional planning and decisionmaking that the Congress intended. It would assure that the numerous decisions made in the region are made on the basis of an environmental overview of the impacts and available alternatives.

Although energy development is an important and serious problem which must be dealt with on many fronts, the Congress has not made an exception to NEPA for such problems. Indeed, there is no better example of a national issue which necessitates the comprehensive, systematic, and interdisciplinary approach required by NEPA.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

JOHN D. DINGELL
Member of this Court's Bar

April, 1976.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-552

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF
THE COMMONWEALTH OF VIRGINIA, AND THE
CUMBERLAND PLATEAU PLANNING DISTRICT
COMMISSION AS AMICI CURIAE

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
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On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF
THE COMMONWEALTH OF VIRGINIA, AND THE
CUMBERLAND PLATEAU PLANNING DISTRICT
COMMISSION AS AMICI CURIAE

The Commonwealth of Virginia, and the Cumberland Plateau Planning District Commission (hereafter Cumberland) respectfully submit this brief as amici curiae for consideration by this Court. Virginia and Cumberland support the position of respondents Sierra Club, *et al.*, and urge the Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit.

DESCRIPTION AND INTEREST OF AMICI CURIAE

Virginia is a major producer of eastern coal. The Appalachian States, including West Virginia and Virginia, account for approximately two-thirds of the Nation's coal production. Final Environmental Impact Statement, Proposed Federal Coal Leasing Program ("Coal Programmatic EIS"), United States Department of the Interior, p. 8-30. Eighty percent of the coal produced in Virginia is low in sulfur content, containing less than one percent sulfur. Sulfur Content of United States Coal, Bureau of Mines Information Circular 8312. A large portion of the coal produced by the Appalachian States is consumed by energy markets in the eastern and midwestern United States.

Virginia is concerned that the action of the Federal government in refusing to consider the overall nationwide impact of its coal-leasing activities will adversely affect vital economic and social aspects of their environment. In southwestern Virginia coal production has been the dominant industry for generations. For many reasons, particularly cheaper sources of energy from domestic natural gas and imported oil, the coal producing areas in the Appalachian States have been in a very depressed and impoverished condition for many years, and have been the object of considerable federal efforts

to improve their economic situation. The present national need for coal presents an opportunity for Appalachia to advance economically as a major source of the nation's coal. The development of huge federal reserves of coal in the west seriously threatens the economic foundation of Appalachia, and this should be carefully considered in any determination of the costs and benefits of such development.¹

The Cumberland Plateau Planning District Commission is an agency of local government created by the governments of Buchanan, Dickenson, Russell and Tazewell Counties in the southwest region of Virginia, pursuant to Virginia law. Code of Virginia, Sections 2.1-63.5 and 15.1-1403, *et seq.*, as amended. Its purpose is to assure the orderly future development of the area. Its staff engages in research and planning activities in order to advise local governments as to the future economic, social and environmental effects of their decisions. This work is financed by funds received from participating local governments and through grants received from Federal and State agencies. The Commission is a policy-making body whose members are local officials appointed by participating local governments.

The area served by the Cumberland Plateau Planning District Commission accounts for 80 percent of the coal produced in Virginia. The Commission is concerned that the Federal government's failure to consider the national implications of its coal leasing decisions will have adverse effects upon eastern coal producing areas and that these effects will be felt most immediately and most seriously at the local level.

¹ In addition, any curtailment in coal production will cause loss of coal traffic carried by the railroads of the Appalachian region. Coal represents the most important payload of these railroads and has contributed to their relative prosperity. Without it, they may suffer the fate of the northeastern railroads, to the great detriment of the national transportation network.

ARGUMENT

Virginia and the Cumberland Commission urge the Court to affirm the decision of the court below that Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), requires the Federal government to prepare a comprehensive environmental impact statement which will analyze the environmental effects of intensive coal development in the Northern Great Plains region and reasonable alternatives to that development. Since the legal arguments in support of this position are fully presented by respondents, amici will not repeat these contentions. Instead, we will show that substantial environmental issues of importance to us and other eastern States and localities have not been adequately considered in an environmental statement concerning western coal development and can only be adequately considered in an overall regional impact statement.

I

A REGIONAL ENVIRONMENTAL STATEMENT IS NECESSARY TO ANALYZE THE SOCIAL AND ECONOMIC EFFECTS OF THE FULL NORTHERN GREAT PLAINS COAL PRODUCTION ON THE APPALACHIAN COAL REGION

Until very recently, the Department of the Interior, which has responsibility for permitting the mining of coal on federal lands, has taken the position that the National Environmental Policy Act required no more than environmental statements for particular mining plans. Environmental statements were not even prepared when leases were issued. The Department seems now to have reconsidered its position. It has prepared an environmental statement for a group of four coal mines and a railroad line in the Eastern Powder River Coal Basin of Wyoming which it describes as a regional

impact statement and has declared that it will henceforth prepare such "regional" statements for groups of mines and related activities. In addition, it apparently will analyze individual actions which have significant effect on the environment. Nonetheless, it still refuses to acknowledge that the many federal actions intended to expand coal mining in the region are of such a scale and nature as to constitute a federal program. These actions, comprised of a multitude of decisions, will have an enormous effect on areas of historic coal production outside of the Northern Great Plains.

No environmental impact statement issued to date has attempted to deal in any way with the total effect which wholesale stripping of coal in the Northern Great Plains will have, either within its region or outside of it. The environmental impact statement on the entire federal coal leasing program might have provided a framework for an evaluation of the costs and benefits of producing coal in various areas of the nation, but it did not do so. Instead, that statement focused on areas containing substantial quantities of federal coal, which is not significant in Appalachia. In response to public comment that the statement did not compare eastern versus western coal development, the Department of the Interior added a one-page analysis of this issue which dismissed the potential effect on the eastern coal regions from western coal development with the offhand notation that cessation of federal leasing might help reverse the process of economic decay which presently plagues the Appalachian region (Coal Programmatic, p. 8-31):

Continued or expanded eastern coal production will have the effect of retaining established populations in Appalachian communities. Existing lifestyles will be perpetuated and current economic decay would perhaps be reversed.

We submit that the economic fate of one of the historically most depressed regions of the country requires more than one page to apprise the decision-maker adequately of the effect which accelerated leasing of western coal would have.²

The Department of the Interior has now taken the position that the statement prepared for the Eastern Powder River basin of Wyoming is a proper regional statement, so that no analysis of broader scope need be prepared. However, that statement does not deal with questions of more than limited dimensions. In particular, it does not deal with the impact which massive development of the Northern Great Plains coal fields will have on Virginia and the entire Appalachian region. In discussing alternatives to full-scale coal leasing in the Eastern Powder River Basin, that statement briefly considers coal mining in Appalachia but concludes that the effect of coal exports from the Eastern Powder River "should be slight" and that "[a]ll producing mines and mines now being developed both in Appalachia and in the Eastern Powder River Basin have a ready market for low-sulfur coal * * *." Final Environmental Impact Statement, Eastern Powder River Coal Basin of Wyoming, pp. I-805 to 805a. The difficulty with this comparison is that Appalachia is not competing only with Eastern Powder River coal. It is competing now or in the near future with all of the massive coal production forecast for the entire Northern Great Plains region. Limiting the analysis to only one sub-region fatally restricts the consideration and totally underestimates the impact on Appalachia that mine after mine, sub-region after sub-region, will have.

² There are over 12,000 direct mining jobs in Virginia alone, nearly all of them within the Cumberland Commission's area. Virginia Department of Labor and Industry Annual Report, 1974, p. 85.

If present trends continue in Appalachia, one study has concluded that the number of men employed in the mines will be nearly halved by 1980. Charles River Associates, Inc., The Economic Impact of Public Policy on the Appalachian Coal Industry and the Regional Economy, prepared for the Appalachian Regional Commission, Washington, D.C., 1973. The effect which that reduction in employment would have on this permanently depressed region need not be described.

Amici submit that the National Environmental Policy Act requires the Department of the Interior to weigh these relative regional impacts on large-scale federal coal development in the Northern Great Plains. The full effect of coal development in the Northern Great Plains on the eastern coal-producing states can only be adequately analyzed and fairly considered by a regional statement on the entire Northern Great Plains rather than only a portion of it. We submit that an adequate regional environmental statement is necessary to ensure consideration of these important social, economic, and environmental issues in the Department's decision-making process, and that such consideration is essential to enable the decision-maker to understand the true costs of the various alternatives.

II

THE COMPARATIVE ENVIRONMENTAL EFFECTS OF WESTERN AND EASTERN COAL PRODUCTION CAN BEST BE CONSIDERED IN A REGIONAL ENVIRONMENTAL IMPACT STATEMENT

Amici submit that a site-specific environmental impact statement, however thoroughly it may weigh the impact of a proposed action upon a specific area, is not sufficient if it does not consider the vitally important question whether the environmental effects of similar action elsewhere would be less damaging.

For example, environmental statements which the Department of the Interior has prepared on mining plans in the Northern Great Plains do not compare the effects of strip mining on lands, vegetation and wildlife in areas with little rainfall and poor soil with deep mining or with strip mining in areas where reclamation is substantially easier and more certain. It does not compare the effect of coal production in the west on that region's land and water with the environmental effects of coal production in the east. It does not compare the environmental effects and the costs in resources of moving coal or electricity long distances by rail, slurry pipeline or transmission line with the environmental effects and costs of transportation of coal or electricity from areas near the point of consumption. It does not compare the relative environmental effects on air quality of using coal, often without sulfur control technology, in regions of extremely clean air against the effects of using the best technology available with coal of the same or somewhat higher sulfur content. It does not consider the environmental effects of consuming large amounts of energy and possibly of water in order to move coal or electricity long distances.

The Department of the Interior mentions in its one-page analysis of western versus eastern coal production that (Coal Programmatic EIS, pp. 8-21 to 8-32):

Transportation systems and utilities are already constructed much more extensively in the East than in the West. As such, expansion of the eastern coal industry would not require the degree of pioneer construction (roads, railroads, pipelines, power) as needed elsewhere. In summary, eastern coal development would impact on less surface terrain than western coal since it will be predominantly underground mining.

The Department of the Interior's position that it is not required to prepare a comprehensive environmental impact statement on its decision to award scores of coal leases in the Northern Great Plains region effectively means that it will not be able to weigh the relative environmental and economic impacts which these brief comments acknowledge exist as to transportation systems and surface terrain in eastern and western coal mining areas. In a time of capital shortage and national railroad problems, we submit that no federal decision-maker can adequately weigh the costs and benefits of this coal-leasing program without a full consideration of these likely effects.

Amici submit that the National Environmental Policy Act requires that these issues be subjected to more than a mere comment. The relative environmental costs of strip and surface mining, the relative impacts on land, air and water resources, and the effects on energy supplies of long-distance transportation are issues which the Department of the Interior should consider carefully when it contemplates awarding scores of coal leases in a region where geological, hydrological, and climatic characteristics, and distances from potential markets may cause far greater environmental harm than would result from increased coal production in another region.

III

A REGIONAL ENVIRONMENTAL IMPACT STATEMENT IS NECESSARY TO ANALYZE THE RELATIVE COSTS OF EASTERN AND WESTERN COAL

None of the few environmental impact statements which have been prepared concerning federal activities in the Northern Great Plains have considered the question whether western coal, which is generally much lower in heat value than eastern coal, is actually cheaper or more expensive than eastern coal when delivered

to the midwestern and eastern markets traditionally served by eastern coal. Coal is more expensive to ship than any other fuel; transportation costs account for approximately 30 percent of the total delivered price. Greater Coal Utilization, Joint Hearings before the Senate Committees on Interior and Insular Affairs and Public Works, 94th Cong. 2d Sess., p. 268 (1975). In a society committed to energy conservation, the wastefulness of shipping western coal to eastern markets when local coal is readily available is at best questionable. See Telegram to the President from Senator Jennings Randolph of West Virginia reproduced in Greater Coal Utilization, *supra*, p. 1460.

The Department of the Interior states in the Coal Programmatic Statement that "Eastern bituminous coal . . . has a 35 percent greater heat value than western subbituminous coal." Coal Programmatic, p. 8-31. This is the extent of its analysis. There is no consideration of the effect of this considerable disparity in heat value upon the relative costs of eastern and western coal or on the relative costs of transporting equivalent quantities of coal in terms of heat value.

It cannot be assumed that western coal is being mined and shipped to the east and midwest because it is cheaper. The Northern Great Plains Resources Program Report (p. 32), which was recently issued by various federal agencies including the Department of the Interior, shows that strip-mined coal delivered by train from the Northern Great Plains to Chicago, New Orleans, Atlanta and other points farther east is more expensive than Appalachian coal delivered to those points from strip mines and even from underground mines. Moreover, vast quantities of coal, including low sulfur coal, are available in Appalachia, enough to supply all needs east of the Mississippi for many decades to come.

It thus appears that the heavy emphasis by industry on western coal may not be based on lower total costs for western coal, or lack of adequate reserves in the east, but rather on other factors such as the ease by which coal companies can obtain large blocks of strip-pable coal from the Federal government. It may also be based on the fact that a "fuel adjustment clause" in the tariffs of many utilities permits them to pass through all increased fuel costs, including transportation costs, to their consumers without necessitating a hearing before a state utility commission. See Facts About Coal in the United States, pp. 18-19, reprinted in Greater Coal Utilization, *supra*, pp. 247-248.

. . . .

These issues are plainly matters worthy of serious study. A fair analysis of the effects of western coal development on the economic, social, and environmental character of Appalachia, as well as of the Northern Great Plains, of the comparative environmental effects of coal production on Appalachia and the Northern Great Plains, of the comparative economic cost of coal delivered in the eastern half of the country, both in price per ton and in the effects it has on national investment, transportation, and job development plans, might well have a major impact on the decisions of the Secretary of the Interior.

On the one hand, as respondents' brief sets forth, massive coal development of the Northern Great Plains seriously threatens the environment of that region. On the other hand, massive development of the Northern Great Plains seriously threatens the economic and social well-being of Appalachia and therefore the human environment in which its population lives. Moreover, it is likely that western coal will be higher in price when delivered to eastern and middle western markets than low-sulfur Appalachian coal. A regional environmental

impact statement which adequately analyzed and presented these issues to the Secretary of the Interior might well persuade him, at the very least, to limit the scope of development in the west to a level which would reduce the harm both to Appalachia and to the Northern Great Plains.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia and the Cumberland Plateau Planning District Commission urge the Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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